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No. 87-1284/2038; 87-1286/2072

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

FRANCIS R. FITZSIMMONS and

ROGER TOWNE (Petitioners)

-vs-

UNITED STATES OF AMERICA (Respondent)

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

Did the Sixth Circuit err when it affirmed Fitzsimmons' and Towne's RICO conspiracy conviction by permitting an invalidly-pleaded substantive RICO offense to serve as proof of Fitzsimmons' participation in the conspiracy?

Did the Sixth Circuit err when it required Fitzsimmons to establish that evidence obtained in violation of his Sixth Amendment rights was introduced at his trial?

Did the Sixth Circuit err when it failed to reverse Towne's conviction where it was shown that the Government had failed to disclose pre-trial to Towne exculpatory and useful to Towne's defense?

LIST OF PARTIES

Francis R. Fitzsimmons and Roger Towne are Petitioners in this proceeding. The United States of America is Respondent in this proceeding.

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Petitioners Francis R. Fitzsimmons and Roger Towne respectfully pray that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled proceeding on February 26, 1991.

OPINION BELOW

The Opinion of the Court of Appeals for the Sixth Circuit below (Appendix, Volume VII, page 415 - Volume VIII, page 490) was not recommended for full text publication. The Opinions of the District Court for the Eastern District of Michigan below (Appendix, Volume V, page 320) were not reported.

JURISDICTION

The Order of the Sixth Circuit (Appendix, Volume VII, page 415) was entered on February 26, 1991. Fitzsimmons' Petition

for Rehearing and Rehearing En Banc was denied on April 22, 1991 (Appendix, Volume VIII, page 518). Towne's Petition for Rehearing and Rehearing En Banc, was denied on April 22, 1991. The jurisdiction of this Court is invoked under 28 USC 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Petitioners were prosecuted under 18 USC 1954 and 1962(c) and (d). The Fifth and Sixth Amendments of the United States Constitution and 18 USC 1961 are relevant to the Petition. The full text of all of the statutes and Amendments V and VI are contained in the Appendix, Volume II, pages 70-84.

STATEMENT OF THE CASE

The facts necessary to place in heir setting the questions raised in this etition are stated:

On September 19, 1986, in a cause hen pending in the United States District ourt for the Eastern District of Michigan, outhern Division, entitled United States of merica v Charles F. Collins, et. al., riminal Action 84-20715, Petitioner Francis Fitzsimmons was found guilty by a jury of he count of a substantive RICO offense Count I), one count of RICO conspiracy Count II) and one count of soliciting things f value in violation of 18 USC 1954 (Count . Co-defendant Roger Towne was found Not ilty of (Count I), the substantive RICO ffense, guilty of one count of RICO onspiracy (Count II) and one count of oliciting things of value in violation of 18 C 1954 (Count III).

The Defendant-Petitioners' trial lasted almost nine months. The 40-page Indictment alleged that certain defendants, including Petitioner Towne, gave or promised to give money or things of value to Petitioner Fitzsimmons and others who were associated with the Michigan Conference of Teamsters Welfare Fund in connection with the awarding of health care contracts by the Fund to certain companies which promoted or administered health care plans. The Indictment charged Towne and Fitzsimmons as follows: Count I (RICO substantive offense); Count II (RICO conspiracy); Count III (Towne only - 18 USC 1954); and Count V (Fitzsimmons only - 18 USC 1954). The allegations in Count V (as to Fitzsimmons) and Count III (as to Towne) were incorporated in the Count I RICO charge as the only racketeering act not barred by the five-year limit of prosecutions in 18 USC 3282. The allegations in Counts III and V were also alleged, in substance, in the Count II RICO conspiracy charge. Before

rial began, Fitzsimmons and Towne filed a
tion to dismiss Counts I, II, III and V
cause the allegations in Count V improperly
leged a violation of 18 USC 1954 as a
ntinuing offense. Fitzsimmons' and Towne's
etrial Motion to Dismiss was denied. In
s instructions to the jury on the RICO
nspiracy charge (Count II), the trial court
id:

> . . . The government satisfies its burden if it proves, beyond a reasonable doubt, either that the Defendant agreed to personally commit two acts of racketeering or that the defendant agreed that another would commit two acts of racketeering.

ppendix, Volume II, pages 96-97)

After his convictions, Fitzsimmons
d Towne filed a Motion for Arrest of
dgment as to Counts I, II and V (for

Fitzsimmons) and Counts II and III (as to Towne). The trial court granted Fitzsimmons' Motion for Arrest of Judgment as to Counts I and V and Count III as to Towne, because the Court concluded these Counts improperly alleged a continuing offense and were invalid (Appendix, Volume II, page 102). The conviction on Count I was arrested because the only predicate act alleged within the five-year limitations period was the Count V offense. Towne had been acquitted of count I by the jury. The trial court refused to vacate Fitzsimmons' and Towne's conviction for RICO conspiracy (Count II) even though the trial court's instruction to the jury on the elements of RICO conspiracy permitted the jury to find that Fitzsimmons and Towne agreed to participate in the RICO conspiracy if they found that Fitzsimmons and Towne agreed to commit the legally invalid offense alleged in Count V and Count III.

After Petitioners' Notice of Appeal had been filed with the Court of

peals for the Sixth Circuit, the Government tained an order to unseal and produced a anscript of a tape recorded statement of tzsimmons which had not been previously sclosed to the defense because of a etrial protective order. On the basis of e newly unveiled transcript, Fitzsimmons d Towne moved for a new trial because of olations of the Fifth and Sixth Amendments itzsimmons) or for an evidentiary hearing d for improperly failing to disclose culpatory and useful material. The trial urt certified that it would grant the tion for an Evidentiary Hearing and the xth Circuit remanded the case. The trial urt held a four-day evidentiary hearing.

After the evidentiary hearing, the ial court made findings of fact and nclusions of law (Appendix, Volume VI, page 1). The trial court determined that the vernment violated Fitzsimmons' Sixth endment right to counsel by permitting onard Schultz, a longtime confidential

informant for the FBI, to record a conversation between Fitzsimmons and Schultz in May 1985, after Fitzsimmons was indicted in this case and after his retained counsel had made an appearance. Schultz had become involved in narcotics trafficking and had been told by the Government that his cooperation would result in the amelioration of his own case.

The FBI gave emergency authorization for the clandestine recording upon a representation that Strike Force Attorney Keith Corbett had determined that no entrapment would result by the recording. At the evidentiary hearing, Corbett testified that he did not remember being asked about a Schultz-Fitzsimmons conversation. The trial court found that the FBI agent who discussed the matter with AUSA Corbett "either omitted or failed to make clear that the conversation would be between Schultz and Fitzsimmons" (Appendix, Volume VI, page 398).

The recorded conversation between ultz and Fitzsimmons lasted approximately hour. At the evidentiary hearing, ernment agents testified that they had tructed Schultz not to discuss the ictment or to recommend that Fitzsimmons ad guilty or approach the Government hout counsel. However, Schultz blatantly ored his alleged instructions and liberately elicited information from tzsimmons regarding the Indictment and tzsimmons' views of his own conduct.

Two days after this conversation was orded, a confidential source told an FBI nt that Fitzsimmons wanted to meet with without his attorney to discuss peration with the Government. The FBI nt told trial attorney AUSA John Newcomer nt Fitzsimmons' request for a meeting and informed Newcomer of the existence of the orded conversation. Newcomer then tened to the tape. Newcomer assumed that recording had been authorized by Strike

Force Attorney Corbett, but Corbett later told Newcomer that he knew nothing of the recording. In a written internal memorandum, AUSA Newcomer stated that he did not plan to use the tape at trial, except for possible impeachment should Fitzsimmons testify. Newcomer concluded the memorandum by stating, "[i]t is too late to isolate trial counsel from any taint that might accompany the existence of or knowledge of the statement of Fitzsimmons."

Newcomer submitted a Motion for a Protective Order, plus an Offer of Proof regarding the recorded conversation and the transcript on October 30, 1985, before trial began. On November 20, 1985, the Court ordered the transcript and recording sealed (Appendix, Volume II, page 99). The Court stated that the transcript and the recording would have been discoverable under FRCrP 16, but that the Protective Order was required by the "special circumstances" of the case.

As to Petitioner Towne, the Sixth Circuit concluded that as to Towne, some of the statements made by Fitzsimmons and tape recorded by Schultz, could be interpreted by a finder of the facts as attempts to explain the dealings with unindicted Coconspirator Brown and that the actions alleged to be taken by Towne were not criminal but as bona fide activities by Petitioner Towne (Appendix, Volume VII, page 465). The trial court made a finding that the tape itself may have been useful to both Towne and Fitzsimmons (Appendix, Volume VII, page 465). Towne's defense was that anything of value that may have been given was given after Fitzsimmons was no longer a trustee, had nothing to do with his position or action as a trustee and was given for a bona fide purpose. Towne had argued that things of value were given after Fitzsimmons was no longer working for the union, motivated by Fitzsimmons coming to work for Towne's company, because Fitzsimmons had substantial

connections with trade unions. His father was president of the entire Teamsters' Union. The surreptitious taped conversation had Fitzsimmons stating these things and confirming a noncriminal purpose as to activities by Towne. Fitzsimmons did not take the stand at his trial. Towne argued Fitzsimmons' words, on the previously described tape recording, were deprived of being presented into evidence by Towne, who had requested a severance on numerous occasions. The jury would have been able to weigh these words as they were exculpatory to Towne and consistent with Towne's total defense as to bona fide purpose and time of action. At the post-trial hearing, government counsel admitted that he wanted the flexibility to use the tape recordings in case Fitzsimmons did take the stand, to use the tape recording for whatever purpose. He did not want to be deprived of its (the tapes') usefulness. At the post-trial hearings the government conceded the tape

recording was "mildly" inculpatory as to Fitzsimmons. Towne's defense was the giving of things of value for a bona fide reason (Appendix, Volume VII, page 468).

Towne maintained the evidence on the tape as to him was admissible, exculpatory as to Towne, material, aided in the preparation of a defense, would have assisted in determinations as to Towne or other Co-Defendants taking the stand to aid in Towne's defense. Towne maintained that the evidence--the tape recording--was admissible under FRE 803(24), FRE 804(b)(3), as reliable and trustworthy evidence. The evidentiary hearing established that Fitzsimmons made these statements to the undercover government informant in private, seeking help or advice and with no knowledge that Fitzsimmons (the declarant) was being recorded.

After making findings of fact, the trial court concluded that Fitzsimmons' Sixth Amendment rights had been violated, but

denied Fitzsimmons a new trial. The trial court determined that Fitzsimmons had to show actual prejudice to be entitled to any remedy for the Sixth Amendment violation. Fitzsimmons then perfected his appeal to the Sixth Circuit.

The trial court concluded that, as to Towne, the failure to disclose the tape and provide its content did not violate **Brady** v **Maryland**, 373 US 83 (1963) and did not constitute a failure to disclose exculpatory material.

The Sixth Circuit upheld the trial court's denial of relief for the Sixth Amendment violation on the grounds that Fitzsimmons had failed to establish prejudice (Appendix, Volume VII, page 462). The Court of Appeals affirmed Towne's and Fitzsimmons' RICO conspiracy conviction on the grounds that "[e]ven though non-offenses, the acts alleged were sufficient to demonstrate that Fitzsimmons and Towne agreed to commit two racketeering acts" (Appendix, Volume VIII,

pages 485-86). Fitzsimmons' and Towne's Petition for Rehearing and Rehearing En Banc was denied on April 22, 1991 (Appendix, Volume VIII, page 518).

REASONS FOR GRANTING THE WRIT

I. The Sixth Circuit Erred When It Affirmed Fitzsimmons' and Towne's RICO Conspiracy Conviction By Permitting An Invalidly Pleaded Substantive RICO Offense To Serve As Proof Of Fitzsimmons' Participation In The Conspiracy.

A. The Sixth Circuit Ignored The Language of the RICO Statute And The Holding Of U.S. v Russell When It Permitted Allegations Which Did Not Charge Crimes To Serve As Proof Of A RICO Conspiracy.

The Sixth Circuit erroneously affirmed the Petitioners' RICO conspiracy conviction. The Sixth Circuit held that the invalid allegations in Count III (Towne) and Count V (Fitzsimmons), as substantially

aphrased in the RICO conspiracy count, ld serve as the basis of a finding that zsimmons and Towne agreed to participate the RICO conspiracy.

To sustain a RICO conspiracy viction, the Sixth Circuit requires proof t the Defendant agreed to the commission any two of the racketeering acts charged the indictment. **United States** v **Joseph**, F2d 549 (6th Cir, 1986), cert den 110 S 1816 (1990). In another petition, this rt has been asked to determine the ficiency of pleading of racketeering acts re the Indictment did not identify the ividual predicate acts which allegedly stituted the "pattern" of racketeering ivity required by 18 USC 1962(c). **United tes** v **Glecier**, 923 F2d 496 (7th Cir, 1), petition for certiorari filed May 31, 1. However, in this case, the Indictment eged specific racketeering acts against zsimmons and specific racketeering acts inst Towne, and the jury was instructed

that they could convict Petitioners of conspiracy if they found that either agreed to personally commit two acts of racketeering or that they agreed that someone else would commit two acts of racketeering.

In this case, the trial court granted arrest of judgment on Counts I, III and V. (Towne was acquitted of Count I before the jury.) The granting of arrest of judgment is based on the language of the Indictment, and not on any evidence adduced at trial. **United States** v **Sisson**, 399 US 267, 90 S Ct 2117, 26 L Ed 2d 608, 618 (1970). By granting arrest of judgment on Counts I, III, and V, the trial court determined that those counts did not charge crimes. The allegations in Counts III and V, which were restated in Count I and were paraphrased in the RICO conspiracy charge, did not state offenses. Acts which are not offenses cannot be racketeering acts in a RICO prosecution.

Under 18 USC 1961(1), an act of
cketeering activity" means "any act which
indictable" under certain criminal
visions of the United States Code and
te law. The Sixth Circuit adopted a
row and incorrect view, proffered for the
st time on appeal by the Government, of
arrested Count III and Count V charge:

> The government offers a narrower characterization. Although the predicate acts are technically not offenses because they are time-barred (or more appropriately invalidly pleaded continuing offenses in an attempt to defeat the time bar), they nonetheless are sufficient to demonstrate that defendant had agreed to participate in the

joint objectives of the conspiracy to perform two predicate acts. To the extent the jury relied on the actual acts alleged in those non-offenses, it relied on acts which were sufficient to demonstrate defendant's participation in the conspiracy. We agree with the latter characterization. Even though non-offenses, the acts alleged were sufficient to demonstrate that Fitzsimmons agreed to commit two racketeering acts. By agreeing to commit those acts, Fitzsimmons entered into the conspiracy.

(Appendix, Volume VIII, pages 485-86)

When the Sixth Circuit used the
rase "acts alleged in those non-offenses"
describe the allegations in the arrested
unts I and V, it clearly meant something
ss than indictable offenses. Only
dictable offenses may be alleged as
cketeering acts or predicate acts. In this
se, the Indictment failed to allege an
ndictable offense" in Count III and Count
That is why the trial court arrested
dgment on Count III and Count V. Count III
d Count V offenses were not racketeering
ts and should not have been considered by
e jury. The opinion is apparently based
on the questionable proposition that a RICO
nspiracy indictment need not allege all
ements of offenses charged as racketeering
ts. That proposition is contrary to the
ding in **Russell** v **United States**, 369 US
, 82 S Ct 1038, 8 L Ed 2d 240 (1962). An
dictment must allege at least the essential
ements of the offense charged, apprise the
fendant of what he must defend against and

permit a defendant to plead double jeopardy to bar his prosecution. **Russell**, at 764.

The Sixth Circuit adopted a constitutionally suspect and substantially lesser standard of proof of RICO conspiracy which violates the admonition in **Russell** v **United States**, **supra**, that an indictment must inform a defendant of the offense charged. The essence of a RICO conspiracy is the agreement to conduct the affairs of an enterprise through a pattern of racketeering activity. 18 USC 1962(c) and (d). The Sixth Circuit determined that circumstantial proof of an agreement was sufficient to sustain a RICO conspiracy conviction without regard to existence of the requisite racketeering activity. This analysis ignores the plain language of the RICO statute, the requirements of the Fifth Amendment and **Russell**, **supra**.

Furthermore, the Sixth Circuit's reliance on **United States** v **Persico** is misplaced. In **Persico**, the Court of Appeals

r the Second Circuit upheld RICO conspiracy
nvictions which relied on predicate acts
r which the defendants had been convicted
re than five years earlier. **United States**
Persico, 832 F2d 705, 714 (2nd Cir, 1987).
e defendants argued that the conduct for
ich they were convicted could not serve as
edicate acts because it occurred more than
ve years before their Indictment. The
cond Circuit held that the Government's
oofs established that the conspiratorial
reement continued until the filing of the
dictment and no limitations error occurred.
rsico, at 713. **Persico** did not address the
sue of the sufficiency of the allegations
the predicate acts charged in the
dictment.

B. The Sixth Circuit's Affirmation Of Fitzsimmons' and Towne's RICO Conspiracy Conviction Ignores This Court's Precedents And Conflicts With Decisions Of Other Circuits.

This Court has frequently held that a conspiracy charge and conviction are fatally defective where a conspiracy conviction is based upon allegations that the objects of the conspiracy were violations of criminal statutes, and the allegations fail to state an offense, and the jury may have premised the conspiracy conviction on conduct which is not criminal. **Stromberg** v **California**, 283 US 359, 51 S Ct 532, 75 L Ed 1117 (1931); **Leary** v **United States**, 395 US 6, 89 S Ct 1532, 23 L Ed 2d 57 (1960); **Chiarella** v **United States**, 445 US 222, 100 S Ct 1108, 63 L Ed 348 (1979); **Zant** v **Stephens**, 462 US 862, 103 S Ct @733, 77 L Ed 2d 235 (1982).

These precedents have been routinely followed by Courts of Appeals, including the Sixth Circuit: **Callanan** v **United States**, 881 F2d 229 (6th Cir, 1989) cert den 110 US 1816 (1990); **United States** v **Marcello**, 876 F2d 1147 (5th Cir, 1989); **United States** v **Mandel**, 862 F2d 1067 (4th Cir, 1988) cert den 469 US 862; **United States** v **Holzer**, 840 F2d 1343 (7th Cir, 1988); **Ingber** v **Enzor**, 841 F2d 450 (2nd Cir, 1988).

In this case, the jury was specifically instructed that the Government could prove either that Towne or Fitzsimmons personally agreed to commit two of the predicate acts alleged in the Indictment or agreed that someone else would commit two of those acts. The RICO conspiracy charge included allegations which paraphrased the allegations in the invalid Count III and Count V. The jury was allowed to consider the invalid allegations in determining whether Fitzsimmons agreed to participate in the alleged RICO conspiracy. A RICO

conspiracy requires the jury to find that the Defendant agreed to the commission of two of the predicate acts alleged in the Indictment. Joseph, supra.

When the trial court determined that Counts I, III and V were legally defective, it determined that an act of racketeering alleged against Fitzsimmons personally or Towne personally was legally insufficient. It also implicitly determined that subparagraphs 5 and 6 of the conspiracy count did not state legally-sufficient objects of the criminal conspiracy because subparagraphs 5 and 6 paraphrased defective Count V and defective Count III. Additionally, Towne had been acquitted of other alleged predicate acts in the substantive conspiracy by the jury.

It is clear from the convictions on Count I, Count III, and Count V that the jury did focus on the invalid allegations in Count III and Count V. The Count V offense (Fitzsimmons - 18 USC 1954 violation),

re-alleged in Count I as a racketeering act, was the only act in Count I within a period not barred within the statute of limitations. Without a finding that Fitzsimmons committed the Count V offense, the jury could not have found Fitzsimmons guilty of the RICO substantive offense alleged in Count I. Similarly, the parallel is true analyzing the content of Counts I, II and III as to Towne.

Furthermore, the record does not reveal any other alternative grounds for the jury's conspiracy conviction. It is a reasonable assumption that the conspiracy conviction on Count II was based on the convictions rendered in Counts V and I and, as to Towne, Count III. During its deliberations, the jury sent a note to the court clerk asking for clarifications as to the verdicts it could render on Counts II and III (Towne's 1954 substantive charge). In response to the trial court's inquiry, the jury indicated that it had already reached unanimous decisions on Counts I, IV, V, VI,

VII and VIII. Since the jury indicated that it had already reached verdicts as to Counts V and I at the time it sent its note to the trial court, it is reasonable to assume that convictions on Counts V and Count I formed the grounds for the jury's conviction of Fitzsimmons on Count II. Because Fitzsimmons may have been convicted of RICO conspiracy based on the legally-invalid allegations of Counts V and I, his conviction on Count II should be vacated. Similarly, analysis of Towne's acquittal of Count I and the legally invalid allegations of Count III establish that his conviction as to Count II should be vacated.

Stromberg, supra, has long held that a conspiracy charge and conviction must be set aside if some of the alleged objects of the conspiracy failed to state offenses and it is possible that the jury relied on the invalid charges in reaching its verdict. The jury may have relied on the invalid Count III, Count V and Count I as incorporated into

and substantially restated in Count II to convict Towne or Fitzsimmons of RICO conspiracy. Because Fitzsimmons was convicted by the jury on Count V and Towne on Count III, the obvious conclusion is that the jury convicted on the RICO conspiracy charge, based upon a finding that either had agreed to the commission of the racketeering acts restated from Count V or Count III into the conspiracy charge. There are no other substantive convictions which can be used to infer the basis of the jury's decision on Count II. Fitzsimmons RICO conspiracy conviction should be vacated. Towne's conspiracy conviction should be vacated.

II. The Sixth Circuit Erred When It Required Fitzsimmons To Establish That Evidence Obtained In Violation of His Sixth Amendment Rights Was Introduced At His Trial.

In **Cutillo et. al.** v **Cinelli**, this Court declined to grant certiorari to a petitioner who asked the Court to determine whether the burden of establishing prejudice from a Sixth Amendment violation rests on the defendant or the prosecution. **Cutillo, et. al.** v **Cinelli**, cert den, 485 US 1037 (1988), opinion below: **Cinelli** v **City of Revere**, 820 F2d 474 (1st Cir, 1987). Justice White dissented from denial of certiorari in **Cutillo**, **supra**, and cited **Cinelli**, the Sixth Circuit opinion in **United States** v **Steele**, **infra**, and the Third Circuit's opinion in **United States** v **Costanzo**, **infra** as establishing a conflict among the Circuits for which certiorari should be granted. Chief Justice Renquist and Justice O'Connor joined Justice White in his dissent. The Sixth Circuit's Opinion in Fitzsimmons establishes that the conflict in the circuits remains unresolved and requires resolution by this Court.

A. The Sixth Circuit Misinterpreted This Court's Holdings in **Weatherford** v **Bursey**, 429 US 545 (1977) and **U. S. v Morrison**, 449 US 361 (1981) And Its Own Precedent In **U. S. v Steele**, 727 F2d 580 (1984).

The Fitzsimmons' opinion concluded
t, even though there had been a Sixth
ndment violation based upon the
entional elicitation of information from
zsimmons through the use of a confidential
ormant and communication of the
ndestine information to the prosecution
t the investigating agents, there was no
is for a new trial because no prejudice was
wn (Appendix, Volume VII, page 462). This
ding misinterprets **Weatherford** v **Bursey**,
US 545, 97 S Ct 837, 51 L Ed 2d 30 (1977)
United States v **Morrison**, 449 US 361, 101
665, 66 L Ed 2d 564 (1981) and misapplies
Sixth Circuit's analysis in **United States**

v **Steele**, 727 F2d 580 (6th Cir, 1984) **cert den**, **Scarborough** v **United States**, 467 US 1209 (1984). Neither **Weatherford**, **Morrison**, nor **Steele**, require that a showing of actual prejudice must be made before a remedy for a Sixth Amendment violation will be tailored.

In **Weatherford**, **supra**, this Court agreed that there was no Sixth Amendment violation based upon trial court's findings of fact that **Weatherford** had not discussed with or passed on to the prosecution information concerning **Bursey's** trial plans or strategy or anything having to do with the defense. 429 US at 554. This Court noted that **Bursey's** claim of violation would have been stronger if, inter alia, "those overheard conversations [had] been used in any other way to the substantial detriment of **Bursey** . . ." Id., at 545.

In **Morrison**, **supra**, this Court assumed that a Sixth Amendment violation had occurred, 449 US at 364. The **Morrison** holding was specifically limited to the

stion of dismissal of the Indictment as an
ropriate remedy. **Morrison** did not require
howing of actual prejudice. This Court
ely held that the Third Circuit's
missal of the indictment was
appropriate" and "drastic" where no
judice was pled or shown. 449 US at 367.

The Sixth Circuit's determination
t there must be some direct use of the
ormation obtained from Fitzsimmons
interprets **Weatherford**, **supra**.
therford requires only a finding that
re is "at least a realistic possibility of
ury to [the defendant] or benefit to the
te." 429 US at 558. **Weatherford** does not
uire a showing of actual use of the
endant's surreptitiously obtained words as
dence at trial. The question is whether
"overheard conversations have produced,
ectly or indirectly any of the evidence
ered at trial." Id. at 552 (emphasis
ed). This view is consistent with the
gestion in **Morrison**, **supra**, that a new

trial may be an appropriate remedy to remove the taint of information obtained by the government in violation of a defendant's Sixth Amendment rights. This Court has also held that a new trial is the most appropriate means of affording a defendant an opportunity to protect himself from the use of evidence obtained in violation of the Sixth Amendment even when the evidence might otherwise be inadmissable. **Black** v **United States**, 385 US 26 (1966); **O'Brien** v **United States**, 386 US 345 (1967).

The Fitzsimmons panel was not bound by the Sixth Circuit's prior holding in **United States** v **Steele**, 727 F2d 580, cert den sub nom **Scarborough** v **U. S.**, 467 US 1209 (1984). In **Steele**, there was no tainted information, no communication to the prosecution, no purposeful intrusion and no Sixth Amendment violation. The **Steele** panel did not reach the issue of what prejudice must be shown before a remedy would be

anted because the Sixth Circuit determined
at no constitutional violation occurred.

Here, the Sixth Circuit concluded
at Schultz and Fitzsimmons did not discuss
fense matters. However, most of their
nversation did relate to the pending
arges against Fitzsimmons. After a four
y evidentiary hearing and a review of
pposed findings of fact and law submitted
the parties, the trial court found that
e majority of the conversation between
tzsimmons and Schultz related to the
dictment. The trial court also found,
ting **Kuhlmann** v **Wilson**, 477 US 436, 477
986), that the information obtained from
tzsimmons was deliberately elicited by the
e of a highly experienced confidential
formant who had a substantial incentive to
oid his own serious drug charges. The
al court stated, "without a doubt, Schultz
ok some action beyond mere listening that
s designed deliberately to elicit
criminating remarks" (Appendix, Volume VI,

page 389). The Schultz-Fitzsimmons conversation on May 1, 1985, lasted more than an hour. Schultz led Fitzsimmons through a discussion of the nature of the charges and Fitzsimmons' view of the facts relating to his case as well as his potential defenses. Fitzsimmons was led to relate his views of his conduct and the charges against him. Fitzsimmons' views were obviously formed after consultations with his attorney over the months after his arraignment.

After listening to the recording of the Schultz-Fitzsimmons conversation, the FBI agent in charge of the Fitzsimmons investigation was of the view that the tape recorded evidence was damaging to the defendant and highly important to the government. Within three weeks of the recording, the prosecutor listened to the tape, discussed it with the case agent and wrote to his superior at the Department of Justice that "it is too late to isolate trial

unsel from any taint which might accompany
e existence or knowledge of the recorded
atements of Fitzsimmons." The Government
en proceeded with its trial and witness
eparations.

At the evidentiary hearing, AUSA
d trial attorney Newcomer testified that
e tape clearly established what Fitzsimmons
d his retained counsel thought of the
iminal charges. These ingredients were not
esent in **Weatherford**. Based upon the
ctual findings of the trial court below,
ere is in this case a "realistic
ssibility of injury to the defendant or
nefit to the state." **Weatherford**, **supra**.

The Sixth Circuit concluded that
e prosecutor's misconduct had not
ejudiced Fitzsimmons. However, neither the
al court nor the Sixth Circuit addressed
zsimmons' argument that the prosecutor's
sconduct had violated the rules of conduct
plicable to Government attorneys. The
th Circuit acknowledged its supervisory

authority to remedy prosecutorial misconduct, but ignored Fitzsimmons' alternative grounds for relief.

Model Code of Professional Responsibility DR 7-104(A)(1) provides that an attorney shall not "communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so."

The United States District Court for the Eastern District of Michigan has adopted the Rules of Professional Conduct for the State of Michigan as the guidelines for attorneys before that Court. Rule A-4, Local Rules of Eastern District of Michigan. In 1985, when the clandestine recording was made, the Code of Professional Responsibility for the State of Michigan included CPR 7-104, which is identical to DR 7-104 of the Model Code. This rule applies to federal

prosecutors. **United States** v **Hamad**, 846 F2d 854 (2nd Cir, 1988), cert den, 111 S Ct 192; ABA Standards Relating to the Administration of Criminal Justice, Standard 3-4.1 (commentary).

The tape recording was not an isolated instance of contact by the prosecution with Fitzsimmons without notice or consent of Fitzsimmons' counsel. Within weeks of the recording, the prosecutor attempted to engage Fitzsimmons in discussions aimed toward a plea resolution of the case without the involvement of Fitzsimmons' retained counsel. These actions clearly violate the rules of conduct which apply to all counsel, but which should have compelling application to prosecutors. The Court's supervisory power exists to protect the integrity of the judicial process and to deter government misconduct. **United States** v **Hasting**, 461 US 499 (1983). The use of an informant first to deliberately elicit information relating to the pending

indictment, followed by the use of another informant to attempt to engage Fitzsimmons in plea negotiations without his counsel, violated the then applicable section of the Michigan Code of Professional Responsibility, DR7-104(A)(1) and Standard 3-4.1(b) of the ABA Code of Professional Responsibility. These rules prohibit contact by counsel with an opposing party to litigation who is represented by counsel. The Sixth Circuit erred when it ignored the clear evidence of the prosecutor's repeated violations of disciplinary rules.

B. The Sixth Circuit's Opinion Conflicts With Opinions Of The Third Circuit, The Court Of Appeals For The District Of Columbia And The First Circuit.

The Sixth Circuit's determination that Fitzsimmons must show actual prejudice to obtain relief for the Government's deliberate violation of his rights conflicts with the holding of the Court of Appeals for the Third Circuit in **United States** v **Levy**, 577 F2d 200 (1978). The Third Circuit has rejected an analysis of remedies for Sixth Amendment violations which require the defense to show actual prejudice. The Third Circuit expressed concern over the trial court's ability to determine prejudice to the defense occasioned by a knowing invasion of the attorney-client privilege and the disclosure of confidential information to the Government:

> . . . [W]e think that there are overwhelming considerations mitigating against the standard which tests the Sixth Amendment violations by weighing how prejudicial

to the defense the disclosure is. . . [i]t is highly unlikely that a court can, in such a hearing, arrive at a certain conclusion as to how the Government's knowledge of any part of the defense strategy might benefit the Government in its further investigation of the case, in the subtle process of pretrial discussion with potential witnesses, in the selection of jurors or in the dynamics of trial itself . . . [t]he Sixth Amendment violations might be disclosed, if at all, late in the trial or after the trial has been

completed. At that point, the trial court applying an actual prejudice test would face the virtually impossible task of re-examining the entire proceeding to determine whether the disclosed information influenced the Government's investigation or presentation of its case or harmed the defense in any other way. **Levy**, supra at 208.

The Third Circuit also considered and rejected analogies to remedies for Fourth Amendment violations as failing to protect the broader concerns of the Sixth Amendment:

> We think that the inquiry into prejudice must stop at the point where

> attorney-client confidences are actually disclosed to the government enforcement agencies responsible for investigating and prosecuting the case. Any other rule would disturb the balance implicit in the adversary system and thus would jeopardize the very process by which guilty and innocence are determined in our society. **Levy**, **supra** at 209.

The Third Circuit rejected the inference that **Weatherford** v **Bursey**, **supra**, required a separate showing of prejudice for relief after actual disclosure of confidential information occurred. **Levy** at 210. Again citing the policies implicated by

ne Sixth Amendment, the Third Circuit
oncluded that **Weatherford** did not "lay down
ne rule" that additional prejudice beyond
ctual disclosure must be shown. Id. The
ird Circuit has reaffirmed its position in
nited States v **Costanzo**, 740 F2d 251 (1984),
ert den, 105 S Ct 3477 (1985).

The Sixth Circuit's opinion also
nflicts with the holding of the Court of
peals for the District of Columbia in
iggs v **Goodwin**, 698 F2d 486, 493 (DC Cir,
83), cert den, 104 S Ct 104 (1984). Citing
United States v **Morrison**, **supra**, the
iggs Court stated that the amount of
ejudice to be shown before a remedy will be
anted need not require a showing that the
tual outcome of the trial was affected.

The Sixth Circuit's holding in
tzsimmons also conflicts with the approach
the First Circuit, which shifts the burden
proof to the prosecution once the
fendant establishes a prima facie case of

prejudice resulting from the violation of his Sixth Amendment rights. **Cinelli** v **City of Revere**, 820 F2d 474 (1987), cert den sub nom **Cutillo, et. al.** v **Cinelli**, 485 US 1037 (1988).

III. The Petitioner Towne's Conviction On Count II, RICO Conspiracy, Should Be Reversed Because The Government's Improper Conduct And The Ultimate Deprivation Of A Secretly Made Tape Recording Constituted A Denial Of Fair Trial And Violated Principles Set Down By This Court In **Brady v Maryland**, 373 US 83 (1963), And Its Progeny As The Tape Recording Contained Material That Was Exculpatory As To Towne And/Or Would Have Greatly Aided In The

Presentation And Preparation

Of His Case.

The Petitioner Towne's trial was
rejudiced by the Government's failure to
isclose the secret tape recording of
itzsimmons made by the Government Informant
chultz. He did not receive a fair trial or
onstitutional Due Process within the meaning
United States v **Agurs**, 427 US 97 (1976).
me of the words spoken by Fitzsimmons on
e tape recording, made after the Indictment
Fitzsimmons and Towne but prior to trial,
re exculpatory as to the Petitioner Towne.
rtainly these words went to the heart of
wne's defense. The actions by the
vernment and the unavailability of the
idence, exculpatory and useful to the
fendant in preparation and conduct of his
fense at trial constitute a Due Process
olation and his conviction must be
versed. **Brady** v **Maryland**, 373 US 83
963).

The gravamen of the only count to which Towne stands convicted is centered in the intent and purpose for Towne giving things of value to Fitzsimmons. 18 USC Section 1954 makes it a crime only if the things of value were given to influence the actions, decisions and duties of Fitzsimmons related to his ERISA function, when he was Trustee of the Teamsters Welfare Fund.

Towne's defense maintained that his purpose was bona fide, not criminal. Whatever was given to Fitzsimmons was not at a time when he was Trustee, nor were his actions as a Trustee--but at a later time--after Fitzsimmons had long resigned his position as Trustee. It was for the purpose of getting Fitzsimmons to come to work for a company associated with Towne if such employment were to be allowed.

The trial court conceded (at a post-trial hearing) that the tape itself may have been useful to the Defendant (Appendix, Volume VII, page 465). Additionally, the

al court conceded that the recorded words
Fitzsimmons as to Towne contained
planations that the dealings of Fitzsimmons
h Towne were bona fide (Appendix, Volume
, page 468).

The Petitioner Towne maintains the
ions of the Government in suppressing the
e and therefore making unavailable words
Fitzsimmons that exculpate Towne are part
the Due Process violation and the denial
him of a fair trial. The Government, in
ting the trial court's Protective Order
pressing the tape recording from pre-trial
covery and its use by Petitioner, resorted
repeated false representations to the
al court. This is a conclusion reached by
trial court (Appendix, Volume VI, pages
-398).

The deprivation of exculpatory and
ful material, when reviewed in the context
the control of 18 USC 1954 offenses
ablishes that had the evidence been
closed, there is a reasonable probability

that the result of the proceedings would have been different. **United States** v **Bagley**, 473 US 667, 182 (1985).

The actions of the Government and misuse of the trial court in obtaining the Protective Order (an Order that also held that the tape recording was FRCrP 16 material (Appendix, Volume II, pages 100-101) was the equivalent of conduct frowned upon in earlier Court of Appeals' decisions. Prior statements, given by a witness (herein potential words of witness/co-defendant Fitzsimmons) made unavailable due to the wrongful conduct of a party (in the instant matter the Government obtaining in a false manner the Protective Order), is admissible against the party, where the statements would have been admissible had the witness been available to testify on behalf of the Petitioner; e.g., **Steele** v **Taylor**, 684 F2d 1193 (6th Cir, 1982). The Government made Fitzsimmons unavailable, knowing he is charged as a co-defendant. They wrongfully

posed a severance and deprived Towne of the
e-trial use or knowledge of Fitzsimmons'
rds on the tape recording that contained a
na fide purpose as to receipt of things of
lue from Towne. The reason for reversal of
conviction under such Government conduct is
sed in part on public policy recognition by
courts that protects the integrity of the
versary process. The protection deters
tigants from acting on strong incentives to
owingly make unavailable adverse testimony
vidence) on a principle of reciprocity
nilar to the equitable doctrine of clean
nds. This principle applies to the
vernment as a party to litigation. **Steele**
Taylor, **supra**. It cannot be lost upon the
rt that the Government made the secret
e of Fitzsimmons unavailable to Towne
rough its unnecessary and falsely
resented need for the Protective Order.

The portion of the tape transcribed
part of the record (Appendix, Volume III,
es 183-190) established Fitzsimmons

commenting on the innocent reason for receipt by his wife of a job and some Eleven Thousand Dollars. Fitzsimmons stated he was not working for the union at the time. He was not at ERISA employee or Trustee of the Fund at the time of receipt. Receipt of things of value from Towne had nothing to do with the union. They were interested in future connections with Fitzsimmons' father. The things of value and purpose with respect to time and date were in December of 1981--long after Fitzsimmons had resigned as a Trustee of the Fund. It was claimed this was bona fide compensation.

The jury had trouble as to Petitioner Towne. He was acquitted of the RICO substantive count containing predicate acts of giving for an unlawful purpose. The bona fide purpose as to Fitzsimmons' words spoken to the Informant and secretly recorded were crucial and important. They go to the reasonable probability that the outcome may

have been different. **United States** v **Bagley**, **supra**, page 50.

The trial court, in its post-trial opinion, by implication **seems** to accept the admissibility of the taped words of Fitzsimmons (Appendix, Volume VI, page 401-402). However FRE 803(24) provides that the taped words of the unavailable Fitzsimmons (a co-defendant, who did not take the stand and could not be compelled to do so; a severance was not allowed Towne and Towne knew nothing of the tape recording) were admissible evidence at trial. Intent was key to Towne's charges. **United States** v **Popenas**, 780 F2d 545 (6th Cir, 1985) provides guidance on the issue. Here the taped words as to Towne: (a) would be offered as evidence of a material fact--probative of a bona fide intent; (b) the circumstances had guarantees of trustworthiness, including some things Fitzsimmons said as inculpatory to Fitzsimmons; (c) admissibility was consistent with the interest of justice; (d) lastly,

there was no way notice of intent to offer the taped statement of Fitzsimmons could be given as Towne had no pre-trial knowledge of its existence. See also **United States** v **Puglisi**, 740 F2d 240 (2nd Cir, 1986) (dicta court condemns the structure of a trial and activity used by the Government to keep out evidence that was relevant and material to a defense).

The instant matter troubled the jury as to Towne. They split on their verdict, acquitting Towne of the RICO substantive offense! A reasonable doubt could be found and the result, had the hidden evidence been presented or the Petitioner allowed the use for the preparation of his defense; i.e., taking the stand, support for a severance, getting Fitzsimmons to take the stand; produces under a fair interpretation of **Brady** and **Bagley**, **supra**, at pages 46 and 50 and page, that the outcome would have been different. If fair trials, constitutional protections and procedural rules promoting

fairness are to have real meaning, the sole conviction, RICO conspiracy, on the single count the Petitioner Town has set against him, should be reversed by this Honorable Court.

CONCLUSION

Fitzsimmons' and Towne's RICO conspiracy convictions were affirmed on the basis that proof of an agreement to commit acts which are not crimes is sufficient to establish participation in a RICO conspiracy. Fitzsimmons was denied any relief for the Government's deliberate violations of his right to counsel because the lower courts required him to show that the Government made direct use of the clandestine tape recordings at Fitzsimmons' and Towne's trial. Both of these decisions are erroneous. Further, Towne was denied a fair trial. The Government improperly failed to disclose exculpatory and useful evidence that violated

Constitutional and procedural protections that require the reversal of Towne's conviction. The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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91-55 (2)

Supreme Court, U.S.
FILED
JUL 5 1991
OFFICE OF THE CLERK

No. 87-1284/2038; 87-1286/2072

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

FRANCIS R. FITZSIMMONS and

ROGER TOWNE (Petitioners)

-vs-

UNITED STATES OF AMERICA (Respondent)

APPENDIX, VOLUME I-A

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

FRANCIS R. FITZSIMMONS and

ROGER TOWNE (Petitioners)

-vs-

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APPENDIX

VOLUME I

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

NITED STATES	Criminal No.
F AMERICA,	84-20715
Plaintiff,	
	VIOLATIONS:
HARLES F. COLLINS,	18 USC
RANCIS RICHARD	Section 2,
ITZSIMMONS,	1954,
ERRANCE L. PORTER,	1962(c) and
OL C. SCHWARTZ and	(d) and
OGER TOWNE,	(1963(a)(1)(2)
Defendants.	

_____/

INDICTMENT

HE GRAND JURY CHARGES THAT:

01

GENERAL ALLEGATIONS

1. The Michigan Conference of eamsters Welfare Fund (hereinafter eferred to as the Welfare Fund), located at 700 Trumbull Avenue, Detroit, Michigan was n employee welfare benefit plan within the eaning of and subject to the provisions of itle 1 of the Employee Retirement Security ct of 1974 (hereinafter ERISA), Title 29, nited States Code, Sections 1001, et eq., and was an employee welfare benefit lan, established and maintained by n employee organization representing mployees engaged in commerce and the ctivities of which affected interstate ommerce within the meaning of Title , United States Code, Section 1003.

2. At all times relevant herein, he following corporations and partnerships, irectly and indirectly, engaged in the usiness of promoting and administering ealth care and welfare benefit plans and

provided services and counsel in the operation and administration of welfare benefit plans for the Welfare Fund, which business was engaged in and the activities of which affected interstate commerce:

(a) Delaware Professional Services, Inc. (hereinafter referred to as DPS), a corporation incorporated under the laws of the state of Delaware and doing business in Michigan and Illinois with principal offices at Southfield, Michigan and Des Plaines, Illinois;

(b) Delaware Network Computer, Inc. (hereinafter referred to as DNC), a corporation incorporated under the laws of the state of Illinois with principal offices at Des Plaines, Illinois;

(c) Combined Professional Services, Inc. (hereinafter referred to as CPS), a corporation incorporated under the laws of the state of Michigan with offices at Detroit, Michigan, Southfield, Michigan and Des Plaines, Illinois;

(d) National Health Corporation (hereinafter referred to as NHC), a corporation incorporated under the laws of the state of Delaware and doing business in Illinois and Michigan with offices at Detroit, Michigan, Southfield, Michigan and Des Plaines, Illinois;

(e) Occumedics, Ltd. of Michigan, Inc. (hereinafter referred to as Occumedics), a corporation incorporated under the laws of the state of Michigan with principal offices at Southfield, Michigan. Occumedics changed its name to National Health Corporation of Michigan in December 1981;

(f) Federal Services Company, Ltd. (hereinafter referred to as Federal Services), a limited partnership doing business in the states of Michigan and Illinois with offices at Chicago, Illinois and Detroit, Michigan;

(g) Federal Computer Systems, Inc. (hereinafter referred to as Federal

C1

Computer), an Illinois corporation incorporated under the laws of the state of Illinois with offices at Oak Brook, Illinois;

(h) Direct Benefit Health Administrators, Inc. (hereinafter referred to as DBA), an Illinois corporation incorporated under the laws of the state of Illinois with principal offices at Chicago, Illinois. DBA was to be a joint venture between DPS and Federal Services and was to provide a health care plan for the Welfare Fund.

3. At all times relevant herein, Edward J. Brown (deceased) was an officer, agent, director and would participate in the management and operations of DPS, CPS, NBC, Occumedics, DNC and in the anticipated operations of DBA, companies which, directly and indirectly, were in the business of promoting, administering and servicing welfare benefit plans and which had contracts with the Welfare Fund and which businesses were engaged in and the activities of which effected interstate commerce.

4. At all times relevant herein, Defendant ROGER TOWNE was an officer, agent, director and would participate in the management and operations of DPS, CPS, Occumedics and in the anticipated operations of DBA, companies which, directly and indirectly, were in the business of promoting, administering and servicing welfare benefit plans and which had contracts with the Welfare Fund and which businesses were engaged in and the activities of which affected interstate commerce.

5. At all times relevant herein, Defendant SOL C. SCHWARTZ was an agent and counsel of the Welfare Fund, and a person who provided benefit plan services to the Welfare Fund, and was an agent and counsel of an organization which provided benefit plan services to the Welfare Fund, to wit, he participated in the management and operations and exercised ownership interest of Federal Services, Federal Computer and in the anticipated operations of DBA, companies

which, directly and indirectly, were in the business of promoting, administering and servicing welfare benefit plans and which had contracts with the Welfare Fund and which businesses were engaged in and the activities of which affected interstate commerce. SOL C. SCHWARTZ was a person within the meaning of Title 18, United States Code, Section 1954(1) and (4).

6. At all times relevant herein, Allen M. Dorfman (deceased) was an agent and counsel of the Welfare Fund, and a person who provided benefit plan services to the Welfare Fund, and was an agent and counsel of an organization which provided benefit plan services to the Welfare Fund, to wit, he participated in the management and operations and exercise ownership interest of Federal Services, Federal Computer and in the anticipated operations of DBA, companies which, directly and indirectly, were in the business of promoting, administering and servicing welfare benefit plans and which had

contracts with the Welfare Fund and which businesses were engaged in and the activities of which affected interstate commerce. Allen M. Dorfman, was a person within the meaning of Title 18, United States Code, Section 1954(1) and (4).

7. Defendant FRANCIS RICHARD FITZSIMMONS, also known as Dick Fitzsimmons, was an organizer for the International Brotherhood of Teamsters (hereinafter referred to as IBT), and was a Trustee, custodian, counsel and agent of the Welfare Fund. FITZSIMMONS held these positions until January 2, 1980. He was the son of the then IBT General President, Frank E. Fitzsimmons. He was married to Genevieve Fitzsimmons. FRANCIS RICHARD FITZSIMMONS was a person within the meaning of Title 18, United States Code, Section 1954(1).

8. At all times relevant herein, Defendant CHARLES F. COLLINS was an administrator, officer, custodian, counsel, agent and employee of the Welfare Fund and

held the positions of Executive Secretary and Executive Director until August 1983. As Executive Secretary and Executive Director, he was in charge of the Welfare Fund staff. CHARLES F. COLLINS was a person within the meaning of Title 18, United States Code, Section 1954(1).

9. At all times relevant herein, Defendant TERRANCE L. PORTER was an officer, owner and would control and manage Metro Home Healthcare Services, Inc. and Terrance L. Porter & Associates, Inc., (hereinafter referred to as MHHS and TPA respectively), Michigan corporations incorporated under the laws of the state of Michigan with principal offices at Dearborn, Michigan. He was an associate of FRANCIS RICHARD FITZSIMMONS and ROGER TOWNE.

10. At all times relevant herein, Robert Holmes, was a vice-president of the IBT, president of the Michigan Teamsters Joint Council No. 43, president of IBT Local

337 and was a Trustee, custodian, counsel, and agent of the Welfare Fund.

11. At all times relevant herein, Donald Ward and Alfred Happensack were Trustees of the Welfare Fund, appointed by employers who contributed to the Welfare Fund.

12. At all times relevant herein, Gary Stern was a real estate broker and a business associate of ROGER TOWNE.

13. At all times relevant herein, Charles R. Mitchell was a dentist and vice-president of Stratum Five International, Inc. (hereinafter referred to as Stratum) and Healthcare Benefit Services, Inc. (hereinafter referred to as Healthcare) with offices at Downers Grove, Illinois. Stratum furnished dental plan services to the Welfare Fund and Healthcare made the presentation of the dental plan to the Trustees of the Welfare Fund, all on behalf of DPS.

14. At all times relevant herein, Allen M. Stevens was a dentist and was

secretary and one of the principal operating officers of Stratum and Healthcare.

15. At all times relevant herein Koitcho N. Beltchev was a businessman and an associate of Edward J. Brown and ROGER TOWNE. He was born in Bulgaria and resided in Geneva and Gstaad, Switzerland. Between approximately 1950 and 1971, he lived in the United States and became a partner and general manager of New York investment firm called Hayden, Stone, Incorporated.

16. At all times relevant herein Alfonso DiBenedetto was a banker and an associate of Edward J. Brown. He was executive vice president of Banco di Roma in Chicago, Illinois and a consultant to DPS.

COUNT ONE

(18 USC 1962(c) - Racketeer Influenced and Corrupt Organizations)

1. Paragraphs 1 through 16 of the General Allegations of this indictment are realleged in this count and are incorporated by reference as though fully set forth herein.

2. From on or about April 23, 1979, through on or about December 31, 1982, both dates being approximate, the exact dates being unknown to the grand jury, in the Eastern District of Michigan and elsewhere, CHARLES F. COLLINS, FRANCIS RICHARD FITZSIMMONS, TERRANCE L. PORTER, SOL C. SCHWARTZ and ROGER TOWNE, Defendants herein, being persons associated with an enterprise, as defined in Title 18, United States Code, Section 1961(4), said enterprise being an association in fact of the following entities: the Welfare Fund, DPS, CPS, NHC, Occumedics, DNC, Federal Services, Federal Computer, MHHS, TPA and DBA, and which enterprise was engaged in and the activities of which affected interstate commerce, did knowingly, willfully and

unlawfully conduct and participate, directly and indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity as defined in Title 18, United States Code, Sections 1961(1)(B) and (5), in the Eastern District of Michigan and elsewhere, comprised of multiple acts of giving and receiving and agreeing to give and receive, fees, kickbacks, commissions, gifts, loans, money or things of value because of the actions, decisions and duties of those persons related to the Welfare Fund and relating to questions or matters concerning the Welfare Fund, in violation of Title 18, United States Code, Section 1954, as set forth below:

THE PATTERN OF RACKETEERING ACTIVITY

Racketeering Acts One and Two

1. From on or about April 23, 1979 to on or about December 31, 1982, SOL C.

SCHWARTZ, Defendant herein, and Allen M. Dorfman, unlawfully and knowingly agreed to receive and solicited money and commissions from Edward J. Brown, to wit, two percent (2%) of the total monthly receipts DPS received from the Welfare Fund for administering a dental plan contract as a fee, kickback, commission, gift, loan, money and thing of value, because of the actions, decisions and duties of SOL C. SCHWARTZ and Allen M. Dorfman relating to questions and matters concerning the Welfare Fund, to wit, assisting in obtaining approval of the DPS dental plan contract and other decisions involving the operations and administration of the DPS dental plan contract at the Welfare Fund in violation of Title 18, United States Code, Sections 1954 and 2.

2. From on or about December 20, 1979 to on or about December 31, 1982, SOL C. SCHWARTZ, Defendant herein, and Allen M. Dorfman, unlawfully and knowingly agreed to receive and solicited money and commissions

from Edward J. Brown, to wit, to share on an equal basis, that is to say, fifty percent (50%) of any and all administrative or service fees that were to be paid by the Welfare Fund to DPS, CPS and DBA as compensation for other health care plans and services provided by DPS, CPS and DBA to the Welfare Fund, all as a fee, kickback, commission, gift, loan, money and thing of value, because of the actions, decisions and duties of SOL C. SCHWARTZ and Allen M. Dorfman relating to questions and matters concerning the Welfare Fund, to wit, assisting in obtaining approval and in giving advice regarding other proposed welfare benefit plans and services, and other decisions involving the operations and administration of the Welfare Fund in violation of Title 18, United States Code, Sections 1954 and 2.

Racketeering Acts Three Through Five

3. From on or about April 23, 1979 to on or about January 2, 1980 ROGER TOWNE, aided and abetted by TERRANCE L. PORTER, Defendants herein, Edward J. Brown and others, both known and unknown to the grand jury, unlawfully and knowingly offered, agreed and promised to give at a later time to Frances R. Fitzsimmons money and things of value to wit, United States currency and future employment and business associations with TERRANCE L. PORTER, DPS and other companies managed and controlled by Edward J. Brown and ROGER TOWNE, as a fee, kickback, commission, gift, loan, money and thing of value, because of the actions, decisions and duties of Francis Richard Fitzsimmons relating to questions and matters concerning the Welfare Fund, to wit, the operations and administration of the Welfare Fund and the approval of proposed welfare benefit plans

and services in violation of Title 18, United States Code, Sections 1954 and 2.

4. From on or about April 23, 1979 to on or about January 2, 1980 FRANCIS RICHARD FITZSIMMONS, Defendant herein, and others, unlawfully and knowingly agreed to receive and solicited money and things of value to be given at a later time from Edward J. Brown, ROGER TOWNE and TERRANCE L. PORTER, to wit, United States currency and future employment and business associations with TERRANCE L. PORTER, DPS and other companies managed and controlled by Edward J. Brown and ROGER TOWNE, as a fee, kickback, commission, gift, loan, money and thing of value, because of the actions, decisions and duties of FRANCIS RICHARD FITZSIMMONS relating to questions and matters concerning the Welfare Fund, to wit, the operations and administration of the Welfare Fund and the approval of proposed welfare benefit plans and services in

violation of Title 18, United States Code, Sections 1954 and 2.

5. From on or about April 23, 1979 to on or about December 31, 1982, CHARLES F. COLLINS, Defendant herein, unlawfully and knowingly agreed to receive and solicited money and things of value from Edward J. Brown and ROGER TOWNE, to wit, United States currency and future employment and business associations with DPS and other companies managed and controlled by Edward J. Brown and ROGER TOWNE as a fee, kickback, commission, gift, loan, money and thing of value, because of the actions, decisions and duties of CHARLES F. COLLINS relating to questions and matters concerning the Welfare Fund, to wit, the operations and administration of the Welfare Fund and the approval of proposed welfare benefit plans and services in violation of Title 18, United States Code, Sections 1954 and 2.

Racketeering Acts Six Through Nine

6. From on or about November 6, 1979 to on or about November 7, 1979, TERRANCE L. PORTER, Defendant herein, and Edward J. Brown, unlawfully and knowingly offered, agreed and proposed to give, and did give to Francis Richard Fitzsimmons things of value, to wit, hotel accommodations and subsistence at the Fountainebleau Hilton Hotel, Miami Beach, Florida on November 6, and 7, 1979, as well as other benefits, as a fee, kickback, commission, gift, loan, money and thing of value, because of the actions, decisions and duties of Francis Richard Fitzsimmons relating to questions and matters concerning the Welfare Fund, to wit, the operations and administration of the Welfare Fund and the approval of proposed welfare benefit plans and services in violation of Title 18, United States Code, Sections 1954 and 2.

7. From on or about November 6, 1979 to on or about November 7, 1979, FRANCIS RICHARD FITZSIMMONS, Defendant herein, unlawfully and knowingly received, agreed to receive and solicited things of value from Edward J. Brown and TERRANCE L. PORTER, to wit, hotel accommodations and subsistence at the Fountainebleau Hilton, Miami Beach, Florida, on November 6, and 7, 1979, as well as other benefits, as a fee, kickback, commission, gift, loan, money and thing of value, because of the actions, decisions and duties of FRANCIS RICHARD FITZSIMMONS relating to questions and matters concerning the Welfare Plan, to wit, the operations and administration of the Welfare Fund and the approval of proposed welfare benefit plans and services in violation of Title 18, United States Code, Sections 1954 and 2.

8. From on or about December 6, 1979 to on or about December 8, 1979, ROGER TOWNE and TERRANCE L. PORTER, Defendants herein, and Edward J. Brown, unlawfully and

nowingly, offered, agreed and promised to ive, and did give to Francis Richard itzsimmons things of value, to wit, hotel ccommodations, subsistence and limousine ervice at the Hyatt-Regency Hotel, Los ngeles, California, on December 6, 7, and 8, 979, as well as other benefits, as a fee, ickback, commission, gift, loan, money and hing of value, because of the actions, ecisions and duties of Francis Richard itzsimmons relating to questions and matters oncerning the Welfare Fund, to wit, the perations and administration of the Welfare und and the approval of proposed welfare enefit plans and services in violation of itle 18, United States Code, Sections 1954 nd 2.

9. From on or about December 6, 979 to on or about December 8, 1979, FRANCIS ICHARD FITZSIMMONS, Defendant herein, nlawfully and knowingly received, agreed to eceive, and solicited things of value from dward J. Brown, ROGER TOWNE and TERRANCE L.

PORTER, to wit, hotel accommodations, subsistence and limousine service at the Hyatt-Regency Hotel, Los Angeles, California, on December 6, 7 and 8, 1979, as well as other benefits, as a fee, kickback, commission, gift, loan, money and thing of value, because of the actions, decisions and duties of FRANCIS RICHARD FITZSIMMONS relating to questions and matters concerning the Welfare Fund, to wit, the operations and administration of the Welfare Fund and the approval of proposed welfare benefit plans and services in violation of Title 18, United States Code, Sections 1954 and 2.

Racketeering Acts Ten Through Sixteen

10. On or about May 27, 1979 ROGER TOWNE, Defendant herein, and Edward J. Brown, unlawfully and knowingly offered, agreed and promised to give, and did give to Charles F. Collins a thing of value, to wit, round trip air transportation between Detroit, Michigan

and Chicago, Illinois, as well as other benefits, as a fee, kickback, commission, gift, loan, money and thing of value because of the actions, decisions and duties of Charles F. Collins relating to questions and matters concerning the Welfare Fund, to wit, the operations and administration of the Welfare Fund and the approval of proposed welfare benefit plans and services in violation of Title 18, United States Code, Sections 1954 and 2.

11. On or about May,27, 1979 CHARLES F. COLLINS, Defendant herein, unlawfully and knowingly received, agreed to receive and solicited a thing of value from Edward J. Brown and ROGER TOWNE, to wit, round trip air transportation between Detroit, Michigan and Chicago, Illinois, as well as other benefits, as a fee, kickback, commission, gift, loan, money and thing of value because of the actions, decisions and duties of CHARLES F. COLLINS relating to questions and matters concerning the Welfare

Fund, to wit, the operations and administration of the Welfare Fund and the approval of proposed welfare benefit plans and services in violation of Title 18, United States Code, Sections 1954 and 2.

12. On or about June 6, 1979 ROGER TOWNE, Defendant herein, and Edward J. Brown, unlawfully and knowingly offered, agreed and promised to give, and did give to Charles F. Collins a thing of value, to wit, round trip air transportation between Detroit, Michigan and Chicago, Illinois, as well as other benefits, as a fee, kickback, commission, gift, loan, money and thing of value, because of the actions, decisions and duties of Charles F. Collins relating to questions and matters concerning the Welfare Fund, to wit, the operations and administration of the Welfare Fund and the approval of proposed welfare benefit plans and services in violation of Title 18, United States Code, Sections 1954 and 2.

13. On or about June 6, 1979 CHARLES F. COLLINS, Defendant herein, unlawfully and knowingly received, agreed to receive and solicited a thing of value from Edward J. Brown and ROGER TOWNE, to wit, round trip air transportation between Detroit, Michigan and Chicago, Illinois, as well as other benefits, as a fee, kickback, commission, gift, loan, money and thing of value, because of the actions, decisions and duties of CHARLES F. COLLINS relating to questions and matters concerning the Welfare Fund, to wit, the operations and administration of the Welfare Fund and the approval of proposed welfare benefit plans and services in violation of Title 18, United States Code, Sections 1954 and 2.

14. From on or about August 1979 to on or about December 31, 1979 CHARLES F. COLLINS, Defendant herein, unlawfully and knowingly received, agreed to receive, and solicited a thing of value from Edward J. Brown and others, to wit, the free use of an

apartment leased by DPS and located in Gateway Apartments, Farmington Hills, Michigan, as well as other benefits, as a fee, kickback, commission, gift, loan, money and thing of value, because of the actions, decisions and duties of CHARLES F. COLLINS relating to questions and matters concerning the Welfare Fund, to wit, the operations and administration of the Welfare Fund and the approval of proposed welfare benefit plans and services in violation of Title 18, United States Code, Sections 1954 and 2.

15. From on or about January 31, 1981 to on or about February 7, 1981 CHARLES F. COLLINS, Defendant herein, unlawfully and knowingly received, agreed to receive and solicited things of value from Edward J. Brown, to wit, hotel accommodations and subsistence at Canyon Ranch Resort, Tucson, Arizona, from January 31, 1981 to February 7, 1981 and round trip air transportation between Detroit, Michigan and Tucson, Arizona, as well as other benefits, as a fee,

kickback, commission, gift, loan, money and thing of value because the actions, decisions and duties of CHARLES F. COLLINS relating to questions and matters concerning the Welfare Fund, to wit, the operations and administration of the Welfare Fund and the approval of proposed welfare benefit plans and services in violation of Title 18, United States Code, Sections 1954 and 2.

16. From on or about August 1, 1981 to on or about November 30, 1981 CHARLES F. COLLINS, Defendant herein, unlawfully and knowingly received, agreed to receive and solicited things of value from Edward J. Brown, to wit, hotel accommodations and subsistence at Canyon Ranch Resort, Tucson, Arizona, from August 23, 1981 to August 26, 1981, as well as other benefits, as a fee, kickback, commission, gift, loan, money and thing of value, because of the actions, decisions and duties of CHARLES F. COLLINS relating to questions and matters concerning the Welfare Fund, to wit, the operations and

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administration of the Welfare Fund and the approval of proposed welfare benefit plans and services in violation of Title 18, United State Code, Sections 1954 and 2.

FORFEITURES

3. The allegations contained in paragraphs one (1) and two (2) of this Count are realleged and incorporated by reference herein for the purpose of alleging forfeiture pursuant to the provisions of Title 18, United States Code, Section 1963.

4. The Defendants, SOL C. SCHWARTZ, ROGER TOWNE and TERRANCE L. PORTER, have interests, control and ownership in corporations, companies and contracts with the Welfare Fund, as further described in paragraph 6 below, through which they acquired, established, operated, controlled, conducted and participated directly and indirectly, in the conduct of the aforementioned enterprise through a pattern

of racketeering activity in violation of Title 18, United States Code, Section 1962(c), thereby making the above-mentioned interests subject to forfeiture to the United States pursuant to Title 18, United States Code, Section 1963(a)(1)(2).

5. The monies and illicit profits received by the Defendants CHARLES F. COLLINS and FRANCIS RICHARD FITZSIMMONS, in the conduct of the aforementioned enterprise through a pattern of racketeering activity, are also subject to forfeiture to the United States pursuant to Title 18, United States Code, Section 1963(a)(1)(2).

6. The interests of the Defendants subject to forfeiture to the United States include any interests in, security of, claim against, or property and contractual right of any kind, either acquired or maintained and affording a source of influence over the enterprise, including but not limited to the following:

(a) with regard to the Defendant SOL C. SCHWARTZ, any and all positions with and ownership interest in Federal Services, Federal Computer and DBA, and all monies, profits, property and equitable interests and rights, including but not limited to all contracts and agreements with the Welfare Fund and any interests therein that the Defendant has acquired and maintained in violation of Title 18, United States Code, Section 1962(c) and any interests in, security of, claim against, or property or contract right affording the Defendant a source of influence over said enterprise thereby making these interests subject to forfeiture to the United States pursuant to Title 18, United States Code, Section 1963(a)(1)(2).

(b) with regard to the Defendant ROGER TOWNE, any and all positions with and ownership interest in DPS, DBA and Occumedics, and all monies, profits, property and equitable interests and rights, including

but not limited to all contracts with the Welfare Fund and any interests therein that the Defendant has acquired and maintained in violation of Title 18, United States Code, Section 1962(c) and any interests in, security of, claim against, or property or contract right affording the Defendant a source of influence over said enterprise thereby taking these interests subject to forfeiture to the United States pursuant to Title 18, United States Code, Section 1963(a)(1)(2).

(c) with regard to the Defendant TERRANCE L. PORTER, any and all positions with and ownership interest in Metro Home Healthcare Services, Inc. (MHHS) and Terrance L. Porter & Associates, Inc., (TPA) and all monies, profits, property and equitable interests and rights, including but not limited to any contracts with the Welfare Fund, DPS, CPS, NHC, Occumedics and DBA and any interests therein that the Defendant has acquired and maintained in violation of Title

18, United States Code, Section 1962(c) and any interests in, security of, claim against, or property or contract right affording the Defendant a source of influence over said enterprise thereby making these interests subject to forfeiture to the United States pursuant to Title 18, United States Code, Section 1963(a)(1)(2).

COUNT TWO

(18 USC 1962(d)--Conspiracy--Racketeer Influenced and Corrupt Organizations)

1. Paragraphs 1 through 16 of the General Allegations and all of the allegations set forth in Count One of this indictment are realleged in this count and incorporated by reference as though fully set forth herein.

2. From on or about February 1, 1979 through and including the date of this indictment, both dates being approximate, the

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xact dates being unknown to the grand jury, n the Eastern District of Michigan and lsewhere, CHARLES F. COLLINS, FRANCIS ICHARD FITZSIMMONS, TERRANCE L. PORTER, SOL . SCHWARTZ and ROGER TOWNE, Defendants erein, did knowingly and willfully combine, onspire, confederate and agree together and ith each other, and with Allen M. Dorfman nd Edward J. Brown and with other persons oth known and unknown to the grand jury, to ommit certain offenses against the United tates, to wit, to violate Title 18, United tates Code, Section 1962(c), that is, being ersons associated with an enterprise as efined in Title 18, United States Code, ection 1961(4), said enterprise being an ssociation in fact of the following ntities: the Welfare Fund, DPS, DNC, DBA, PS, NHC, Occumedics, MHHS, TPA, Federal ervices and Federal Computer, and which nterprise was engaged in and the activities f which affected interstate commerce, to onduct and participate, directly and

indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity as defined in Title 18, United States Code, Section 1961(1)(B) and (5), in the Eastern District of Michigan and elsewhere, comprised of multiple acts of giving and receiving and agreeing to give and receive fees, kickbacks, commissions, gifts, loans, money or things of value because of the actions, decisions and duties of those persons related to the Welfare Fund and relating to questions or matters concerning the Welfare Fund in violation of Title 18, United States Code, Section 1954.

3. It was part of the conspiracy that ROGER TOWNE and TERRANCE L. PORTER, Defendants herein, and Edward J. Brown and others, would, directly and indirectly, give, offer and promise to give and offer, fees, kickbacks, commissions, gifts, loans, money and things of value to Defendants CHARLES F. COLLINS and FRANCIS RICHARD FITZSIMMONS who were administrators, officers, trustees,

ounsel, agents, and employees of the Welfare
nd and to Defendant SOL C. SCHWARTZ who was
agent and counsel of the Welfare Fund, a
rson who provided benefit plan services to
e Welfare Fund, and who was an agent and
unsel of an organization which provided
nefit plan services to the Welfare Fund,
l because of the actions, decisions and
ties of Defendants CHARLES F. COLLINS,
ANCIS RICHARD FITZSIMMONS, and SOL C.
HWARTZ relating to questions and matters
ncerning the Welfare Fund, to wit, the
erations and administration of the Welfare
nd and the approval of proposed welfare
nefit plans and services in violation of
tle 18, United States Code, Section 1954.

4. It was a further part of the
nspiracy that CHARLES F. COLLINS, FRANCIS
CHARD FITZSIMMONS and SOL C. SCHWARTZ,
fendants herein, would, directly and
directly, receive, agree to receive and
licit, fees, kickbacks, commissions, gifts,
ans, money and things of value because of

their actions, decisions and duties relating to questions and matters concerning the Welfare Fund, to wit, the operations and administration of the Welfare Fund and the approval of proposed welfare benefit plans and services in violation of Title 18, United States Code, Section 1954.

5. It was further part of the conspiracy that ROGER TOWNE and TERRANCE L. PORTER, Defendants herein, Edward J. Brown, and others known and unknown to the grand jury, directly and indirectly, offered, agreed and promised to give at a later time money to Defendant FRANCIS RICHARD FITZSIMMONS who agreed to receive and solicited money, to wit, United States currency in the form of checks drawn on the bank accounts of DPS, CPS and Occumedics which were transferred to Defendant TERRANCE L. PORTER and Gary Stern who then gave checks drawn on their bank accounts to Defendant FRANCIS RICHARD FITZSIMMONS and Genevieve Fitzsimmons, as a fee, kickback, commission,

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gift, loan, money and thing of value, because of the actions, decisions and duties of Defendant FRANCIS RICHARD FITZSIMMONS relating to questions and matters concerning the Welfare Fund, to wit, the operations and administration of the Welfare Fund and the approval of proposed welfare benefit plans and services in violation of Title 18, United States Code, Section 1954.

6. It was further part of the conspiracy that ROGER TOWNE and TERRANCE L. PORTER, Defendants herein, and Edward J. Brown, and others offered, agreed and promised to give at a later time things of value to Defendant FRANCIS RICHARD FITZSIMMONS, who agreed to receive and solicited things of value to wit, future employment and business associations with Defendant TERRANCE L. PORTER, DPS and others companies managed and controlled by Defendant ROGER TOWNE and Edward J. Brown as a fee, kickback, commission, gift, loan, money and thing of value, because of the actions,

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decisions and duties of Defendant FRANCIS RICHARD FITZSIMMONS relating to questions and matters concerning the Welfare Fund, to wit, the operations and administration of the Welfare Fund and the approval of proposed welfare benefit plans and services in violation of Title 18, United States Code, Section 1954.

7. It was a further part of the conspiracy that CHARLES F. COLLINS, Defendant herein, received, agreed to receive and solicited money and things of value from Edward J. Brown and Defendant ROGER TOWNE, to wit, United States currency and future employment and business associations with DPS and other companies managed and controlled by Edward J. Brown and Defendant ROGER TOWNE as a fee, kickback, commission, gift, loan, money and things of value, because of his actions, decisions and duties relating to questions and matters concerning the Welfare Fund, to wit, the operations and administration of the Welfare Fund and the

approval of proposed welfare benefit plans and services in violation of Title 18, United States Code, Section 1954.

8. It was a further part of the conspiracy that Edward J. Brown, would make false declarations to a United States Grand Jury and would misrepresent the extent of his business relationship with Defendant SOL C. SCHWARTZ, and would say that he had obtained the dental contract with the Welfare Fund without the knowledge of Defendant SOL C. SCHWARTZ and Allen M. Dorfman.

9. It was a further part of the conspiracy that Edward J. Brown, would make false statements to agents of the Federal Bureau of Investigation and would deny that money and other things of value had been given and promised to Defendants CHARLES F. COLLINS and SOL C. SCHWARTZ, and would say that he had obtained the dental contract with the Welfare Fund without the knowledge of Defendant SOL C. SCHWARTZ and Allen Dorfman.

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10. It was a further part of the conspiracy that CHARLES F. COLLINS and FRANCIS RICHARD FITZSIMMONS, Defendants herein, would agree to assist Edward J. Brown and ROGER TOWNE, Defendant herein, to obtain dental, optical and health care services business and contracts with the Welfare Fund and would conceal from the Trustees and the members of the Welfare Fund the extent of their association with Edward J. Brown and Defendant ROGER TOWNE and their companies, thereby depriving the Welfare Fund and its members of the right to the loyal, faithful and honest services of CHARLES F. COLLINS and FRANCIS RICHARD FITZSIMMONS, Defendants herein trustees, custodians, counsel, agents and employees of the Welfare Fund.

11. It was a further part of the conspiracy that SOL C. SCHWARTZ, Defendant herein, and unindicted co-conspirator Allen M. Dorfman, would agree to and would assist Edward J. Brown to obtain dental, optical and health care services business and contracts

with the Welfare Fund and would conceal from the Trustees and the members of the Welfare Fund the extent of their association with Edward J. Brown and his companies, thereby depriving the Welfare Fund and its members of the right to the loyal, faithful and honest services of SOL C. SCHWARTZ, Defendant herein, and Allen M. Dorfman, who were agents and counsel of the Welfare Fund, and persons who provided benefit plan services to the Welfare Fund, and who were agents and counsel of an organization which provided benefit plan services to the Welfare Fund, to wit, they participated in the management and operations and exercised ownership interest of Federal Services, Federal Computer and DBA, companies which provided benefit plan services to the Welfare Fund.

12. It was a further part of the conspiracy that CHARLES F. COLLINS, FRANCIS RICHARD FITZSIMMONS, TERRANCE PORTER, SOL C. SCHWARTZ and ROGER TOWNE, Defendants herein, Edward J. Brown, and others, would perform

other acts to hide and conceal and cause to be hidden and concealed the purpose and the acts committed in furtherance of the conspiracy.

OVERT ACTS

In furtherance of the aforesaid conspiracy and to effectuate the objects and purposes thereof, the Defendants and others did commit and willfully cause to be committed the following overt acts:

1. On or about February 22, 1979 Edward J. Brown and ROGER TOWNE had a meeting in Ferndale, Michigan to prepare a summary for CHARLES F. COLLINS.

2. On or about March 12, 1979 ROGER TOWNE and CHARLES F. COLLINS met at a restaurant in Detroit, Michigan.

3. On or about April 23, 1979 Edward J. Brown and SOL C. SCHWARTZ had a meeting in Chicago, Illinois.

4. On or about April 24, 1979 CHARLES F. COLLINS telephoned SOL C. SCHWARTZ.

5. On or about April 27, 1979 CHARLES F. COLLINS, Edward J. Brown and ROGER TOWNE had a meeting in Southfield, Michigan.

6. On or about April 30, 1979 Edward J. Brown, CHARLES F. COLLINS and ROGER TOWNE met in Southfield, Michigan.

7. On or about May 1, 1979 Edward J. Brown, CHARLES F. COLLINS and SOL C. SCHWARTZ met with others in Detroit, Michigan.

8. On or about May 3, 1979 CHARLES F. COLLINS telephoned SOL C. SCHWARTZ.

9. On or about May 3, 1979 at a later time, CHARLES F. COLLINS telephoned SOL C. SCHWARTZ and Allen M. Dorfman.

10. On or about May 7, 1979 Edward J. Brown telephoned SOL C. SCHWARTZ.

11. On or about May 7, 1979 Edward J, Brown, CHARLES F. COLLINS and ROGER TOWNE

travelled to Hilton Head Island, South Carolina.

12. On or about May 18, 1979 CHARLES F. COLLINS telephoned SOL C. SCHWARTZ.

13. On or about May 22, 1979 Robert Holmes telephoned SOL C. SCHWARTZ.

14. On or about May 24, 1979 Edward J. Brown, CHARLES F. COLLINS and SOL C. SCHWARTZ met with the Trustees of the Welfare Fund in Detroit, Michigan.

15. On May 27, 1979 Edward J. Brown and ROGER TOWNE gave round trip air transportation between Detroit, Michigan to Chicago, Illinois to CHARLES F. COLLINS.

16. On or about June 1, 1979 CHARLES F. COLLINS, Edward J. Brown and ROGER TOWNE; attended the Welfare Fund Trustees' meeting in Detroit, Michigan.

17. On or about June 6, 1979 CHARLES F. COLLINS flew from Detroit, Michigan to Chicago, Illinois and met with

ROGER TOWNE at the Continental Plaza Hotel and COLLINS' expenses were paid for by TOWNE.

18. On or about August 3, 1979 CHARLES F. COLLINS, Edward J. Brown and ROGER TOWNE attended the Welfare Fund Trustees' meeting in Detroit and the Trustees approved and signed a contract with DPS for dental services.

19. On August 3, 1979 the Trustees of the Welfare Fund, upon the motion of Robert Holmes, approved and signed a contract with DPS to provide a plan for dental services to the Welfare Fund.

20. On or about August 21, 1979 SOL C. SCHWARTZ, Allen M. Dorfman and others met in Dorfman's office in Chicago, Illinois.

21. On October 4, 1979 the Trustees of the Welfare Fund, upon the motion of Robert Holmes, approved of and signed a contract with Federal Services retroactive to April 1, 1979, to provide a plan for prescription services to the Welfare Fund.

22. On or about November 6, 1979 SOL C. SCHWARTZ and Allen M. Dorfman met in Dorfman's office in Chicago, Illinois.

23. On or about November 6, and 7, 1979 Edward J. Brown, FRANCIS RICHARD FITZSIMMONS, TERRANCE L. PORTER and ROGER TOWNE, met at the Fontainebleau Hotel in Miami Beach, Florida and FITZSIMMONS' expenses were paid for by TERRANCE L. PORTER and Edward J. Brown.

24. On or about November 7, 1979 SOL C. SCHWARTZ and Allen M. Dorfman met in Dorfman's office in Chicago, Illinois.

25. On November 28, 1979 the Trustees of the Welfare Fund, upon the motion of Robert Holmes and seconded by FRANCIS RICHARD FITZSIMMONS, approved of and signed a contract with CPS to provide a plan for optical services to the Welfare Fund.

26. On or about December 4, and 5, 1979 FRANCIS RICHARD FITZSIMMONS, TERRANCE L. PORTER, Edward J. Brown and ROGER TOWNE met

at the Hyatt Regency-Capitol Hill Hotel in Washington, D.C.

27. Between December 6 and December 9, 1979 FRANCIS RICHARD FITZSIMMONS, TERRANCE L. PORTER, Edward J. Brown and ROGER TOWNE met at the Hyatt Regency Hotel in Los Angeles, California and FITZSIMMONS' expenses were paid for by TERRANCE L. PORTER, ROGER TOWNE and Edward J. Brown.

28. On or about December 20, 1979 Edward J, Brown, SOL C. SCHWARTZ and Allen M. Dorfman met in Dorfman's office in Chicago, Illinois.

29. On or about January 8, 1980 SOL C. SCHWARTZ and Allen M. Dorfman met in Dorfman's office in Chicago, Illinois.

30. On or about January 11, 1980 SOL C. SCHWARTZ and Allen M. Dorfman met in Dorfman's office in Chicago, Illinois.

31. Between on or about January 13, 1980 and January 28, 1980 Edward J. Brown, Koitcho Beltchev and Allen M. Dorfman

visited the La Costa Resort near San Diego, California.

32. On or about February 7, 8 and 9, 1980 CHARLES F. COLLINS and Edward J. Brown met in Florida.

33. On or about April 1980 CHARLES F. COLLINS, ROGER TOWNE, Edward J. Brown and Koitcho Beltchev met in the Bahamas.

OTHER OVERT ACTS

On or about the following dates, Edward J. Brown, ROGER TOWNE, TERRANCE L. PORTER, and others caused the following checks to be drawn on the bank account of DPS, CPS and Occumedics and transferred them to TERRANCE L. PORTER and Gary Stern who then gave checks drawn on their bank accounts to FRANCIS RICHARD FITZSIMMONS and Genevieve Fitzsimmons.

vert ct	DPS and CPS Checks to Terrance L. Porter		Overt Act	Terrance L. Porter Checks to Francis Richard and Genevieve Fitzsimmons	
	Date	Amount		Date	Amount
4	2/15/80	$1,000.00	34A	3/13/80	$400.00
5	3/14/80	1,000.00	35A	4/ 1/80	400.00
6	4/15/80	1,000.00	36A	5/ 1/80	400.00
7	5/15/80	1,000.00	37A	5/30/80	400.00
8	6/13/80	1,000.00	38A	6/30/80	400.00
9	7/15/80	1,000.00	39A	8/ 4/80	400.00
9	8/15/80	1,000.00	40A	9/ 8/80	400.00
1	9/15/80	1,000.00	41A	9/30/80	400.00
2	10/15/80	1,000.00	42A	10/31/80	400.00
	11/14/80	1,000.00	43A	12/ 1/80	400.00
	12/15/80	1,000.00	44A	1/ 2/81	400.00
3	1/15/81	1,000.00	45A	2/13/81	400.00
	2/10/81	1,000.00	46A	3/ 3/81	400.00
	3/11/81	1,000.00			
	4/13/81	950.00	48A	5/15/81	800.00
	5/13/81	1,000.00	49A	6/19/81	400.00

Overt Act	Occumedics Ltd. Checks to Gary Stern		Overt Act	Gary Stern Checks to Genevieve Fitzsimmons	
	Date	Amount		Date	Amount
50	5/4/81	$2,000.00	50A	5/28/81	$2,000.00
51	7/22/81	2,000.00	51A	8/ 3/81	2,000.00
52	8/12/81	2,000.00	52A	9/15/81	2,000.00
53	9/11/81	2,000.00	53A	9/30/81	2,000.00
54	10/13/81	2,000.00	54A	11/9/81	2,000.00
55	11/24/81	1,000.00	55A	12/23/81	1,000.00

56. On August 29, 1980 the Defendants caused the Trustees of the Welfare Fund to vote on a DPS proposal to provide a plan for health care services to the Welfare Fund and, upon the motion of Robert Holmes, the Trustees accepted the DPS proposal.

57. On December 12, 1980 SOL C. SCHWARTZ and Allen M. Dorfman caused the Trustees of the Welfare Fund to agree to extend a service contract between the Welfare

Fund and Federal Services, the contract extension being from March 31, 1983 until March 31, 1987, with an option to extend the contract until March 31, 1990.

58. Between on or about January 31, 1981 to February 7, 1981 CHARLES F. COLLINS and Edward J. Brown met at Canyon Ranch Resort in Tucson, Arizona and Edward J. Brown paid for some of Collins' expenses.

59. On March 23, 1981, CHARLES F. COLLINS, reported to the Trustees that the Welfare Fund had realized a net loss of $5.65 million during fiscal year 1980.

60. On or about May 6, 1981 Gary Stern agreed to assist ROGER TOWNE transfer money to Genevieve Fitzsimmons.

61. On or about June 4, 1981 Edward J. Brown testified before a United States Grand Jury in San Francisco, California that he did not have a business relationship with nor had he received any assistance from SOL C. SCHWARTZ and Allen

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Dorfman relating to his contracts with the Welfare Fund.

62. Between on or about August 23, 1981 to August 26, 1981 CHARLES F. COLLINS and Edward J. Brown met at Canyon Ranch Resort in Tucson, Arizona and BROWN paid for some of COLLINS' expenses.

63. On October 1, 1981 the Defendants caused the Trustees of the Welfare Fund to approve of and the Trustees signed a contract with DBA, a joint venture between DPS and Federal Services, to provide administrative health care services to the Welfare Fund.

64. On or about November 6, 1981 Edward J. Brown travelled to Detroit, Michigan and told agents of the Federal Bureau of Investigation that he had not met the Defendant SOL C. SCHWARTZ nor Allen M, Dorfman until after he had received a contract with the Welfare Fund.

65. On December 15, 1981 the Defendants caused the Trustees of the Welfare

Fund to approve of and sign a contract with DPS to provide a plan for health care services to the Welfare Fund.

66. On or about June 18, 1982 business cards were ordered by CPS for FRANCIS RICHARD FITZSIMMONS to identify him as a Marketing Consultant for CPS.

67. On or about October 26, 1982 Robert Holmes gave sworn testimony in a civil deposition in the United States District Court stating that the only person from Illinois with whom he had contact concerning the contract between DPS and the Welfare Fund was Edward J. Brown.

68. On or about January 17, 1983 Robert Holmes gave sworn testimony in a civil deposition in the United States District Court stating that neither Allen M. Dorfman nor anyone from Federal Services requested or had anything to do with the Welfare Fund's retention of DPS.

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69. On or about June 23, 1983 CHARLES F. COLLINS, in sworn testimony before the United States Grand Jury, stated that he could not recall any conversation he had with SOL C. SCHWARTZ or Allen M. Dorfman wherein he attempted to secure their assistance to advocate the DPS dental plan with the Trustees of the Welfare Fund.

70. In or about August 1983 CHARLES F. COLLINS was employed by First Marketing, Inc., Bloomfield Hills, Michigan with assistance from Edward J.Brown.

71. On or about January 18, 1984 Koitcho Belchev, in sworn testimony before the United States Grand Jury, stated that be did not believe that he had ever met Allen M. Dorfman.

72. In or about July 1984, CHARLES F. COLLINS was employed by Edward J. Brown to work for Health Economics Corporation in Dallas, Texas.

All in violation of Title 18, United States Code, Sections 1962(d) and 1963.

FORFEITURES

13. The allegations contained in paragraphs one (1) through twelve (12) of this Count are realleged and incorporated by reference herein for the purpose of alleging forfeiture pursuant to the provisions of Title 18, United States Code, Section 1963.

14. The Defendants, SOL C. SCHWARTZ, ROGER TOWNE and TERRANCE L. PORTER have interests, control and ownership in corporations, companies and contracts with the Welfare Fund, as further described in paragraph 16 below, through which they acquired, established, operated, controlled, conducted and participated directly and indirectly, in the conduct of the aforementioned enterprise through a pattern of racketeering activity in violation of

Title 18, United States Code, Section 1962(c) and (d) thereby making the above-mentioned interest subject to forfeiture to the United States pursuant to Title 18, United States Code, Section 1963(a)(1)(2).

15. The monies and illicit profits received by the Defendants CHARLES F. COLLINS and FRANCIS RICHARD FITZSIMMONS, in the conduct of the aforementioned enterprise through a pattern of racketeering activity, are also subject to forfeiture to the United States pursuant to Title 18, United States Code, Section 1963(a)(1)(2).

16. The interests of the Defendants subject to forfeiture to the United States include any interests in, security of, claim against, property and contractual right of any kind, either acquired or maintained and affording a source of influence over the enterprise, including but not limited to the following:

(a) with regard to the Defendant SOL C. SCHWARTZ, any and all

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positions with and ownership interest in Federal Services, Federal Computer and DBA, and all monies, profits, property and equitable interests and rights, including but not limited to all contracts and agreements with the Welfare Fund and any interests therein that the Defendant has acquired and maintained in violation of Title 18, United States Code, Section 1962(c) and (d) and any interests in, security of, claim against, or property or contract right affording the Defendant a source of influence over said enterprise thereby making these interests subject to forfeiture to the United States pursuant to Title 18, United States Code, Section 1963(a)(1)(2).

(b) with regard to the Defendant ROGER TOWNE, any and all positions with and ownership interest in DPS and Occumedics, and all monies, profits, property and equitable interests and rights, including but not limited to all contracts with the Welfare Fund and any interests therein that

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the Defendant has acquired and maintained in violation of Title 18, United States Code, Section 1962(c) and (d) and any interests in, security of, claim against, or property or contract right affording the Defendant a source of influence over said enterprise thereby making these interests subject to forfeiture to the United States pursuant to Title 18, United States Code, Section 1963(a)(1)(2).

(c) with regard to the Defendant TERRANCE L. PORTER, and all positions with and ownership interest in Metro Home Healthcare Services, Inc. (MHHS) and Terrance L. Porter & Associates, Inc. (TPA), and all monies, profits, property and equitable interests and rights, including but not limited to any contracts with the Welfare Fund, DPS, CPS, DNC, NHC, Occumedics and DBA and any interests therein that the Defendant has acquired and maintained in violation of Title 18, United States Code, Section 1962(c)

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and (d) and any interests in, security of, claim against, or property or contract right affording the Defendant a source of influence over said enterprise thereby making these interests subject to forfeiture to the United States pursuant to Title 18, United States Code, Section 1963(a)(1)(2).

COUNT THREE

(18 USC 1954--Offer or Promise to Give Monies and Things of Value to Influence Operations of Employee Benefit Plan)

1. Paragraphs 1 through 16 of the General Allegations of this indictment are hereby realleged and incorporated as though fully set forth herein.

2. From on or about April 23, 1979 to on or about January 2, 1980, both dates being approximate, in the Eastern District of Michigan and elsewhere, ROGER TOWNE, aided and abetted by TERRANCE L.

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PORTER, Defendants herein, Edward J. Brown and others, both known and unknown to the grand jury, unlawfully and knowingly offered, agreed and promised to give at a later time to Francis Richard Fitzsimmons, money and things of value, to wit, United States currency and future employment and business associations with TERRANCE L. PORTER, DPS and other companies managed and controlled by Edward J. Brown, and ROGER TOWNE, as a fee, kickback, commission, gift, loan, money and thing of value, because of the actions, decisions and duties of Francis Richard Fitzsimmons, relating to questions and matters concerning the Welfare Fund, to wit, the operations and administration of the Welfare Fund and the approval of proposed welfare benefit plans and services as described in Counts One and Two above in greater detail.

All in violation of Title 18, United States Code, Sections 1954 and 2.

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COUNT FOUR

(18 USC 1954--Receiving and Soliciting Money and Things of Value to Influence Operations of Employee Benefit Plan)

1. Paragraphs 1 through 16 of the General Allegations of this indictment are hereby realleged and incorporated as though fully set forth herein.

2. From on or about April 23, 1979 to on or about December 31, 1982, both dates being approximate, in the Eastern District of Michigan and elsewhere, CHARLES J. COLLINS, Defendant herein, unlawfully and knowingly agreed to receive and solicited money and things of value from Edward J. Brown and Robert Towne, to wit, United States currency and future employment and business associations with DPS and other companies managed and controlled by Edward J. Brown and ROGER TOWNE, as a fee, kickback, commission,

gift, loan, money and things of value, because of the actions, decisions and duties the Welfare of CHARLES T. COLLINS relating to questions and matters concerning the Welfare Fund, to wit, the operations and administration of the Welfare Fund and the approval of proposed welfare benefit plans and services as described in Counts One and Two above in greater detail.

All in violation of Title 18, United States Code, Sections 1954 and 2.

COUNT FIVE

(18 USC 1954--Receiving and Soliciting Things of Value to Influence Operations of Employee Benefit Plan)

1. Paragraphs 1 through 16 of the General Allegations of this indictment are hereby realleged and incorporated as though fully set forth herein.

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2. From on or about April 23, 979 to on or about January 2, 1980, both ates being approximate, in the Eastern istrict of Michigan and elsewhere, FRANCIS ICHARD FITZSIMMONS, Defendant herein, aided nd abetted by others, both known and unknown o the grand jury, unlawfully and knowingly greed to receive and solicited money and hings of value, from Edward J. Brown, ROGER OWNE and TERRANCE L. PORTER, to wit, United tates currency and future employment and usiness associations with TERRANCE L. ORTER, DPS and other companies managed and ontrolled by Edward J. Brown and ROGER OWNE, as a fee, kickback, commission, gift, oan, money and thing of value, because of he actions, decisions and duties of FRANCIS ICHARD FITZSIMMONS relating questions and atters concerning the Welfare Fund, to wit, he operations and administration of the elfare Fund and the approval of proposed elfare benefit plans and services as

described in Counts One and Two above in greater detail.

All in violation of Title 18, United States Code, Sections 1954 and 2.

COUNT SIX

(18 USC 1954--Receiving and Soliciting Things of Value to Influence Operations of Employee Benefit Plan)

1. Paragraphs 1 through 16 of the General Allegations of this indictment are hereby realleged and incorporated as though fully set forth herein.

2. From in or about August 1979 to on or about December 31, 19?9, both dates being approximate, in the Eastern District of Michigan and elsewhere, CHARLES F. COLLINS, Defendant herein, unlawfully and knowingly received, agreed to receive and solicited a thing of value from Edward J. Brown and ROGER

TOWNE, to wit, the free use of an apartment leased by DPS and located in Gateway Apartments, Farmington Hills, Michigan, as well as other benefits, as a fee, kickback, commission, gift, loan, money and things of value, because of the actions, decisions and duties of CHARLES F. COLLINS relating to questions and matters concerning the Welfare Fund, to wit, the operations and administration of the Welfare Fund and the approval of proposed benefit plans and services as described in Counts One and Two above in greater detail.

All in violation of Title 18, United States Code, Sections 1954 and 2.

COUNT SEVEN

(18 USC 1954--Receive and Soliciting Things of Value to Influence Operations of Employee Benefit Plan)

C5

1. Paragraphs 1 through 16 of the General Allegations of this indictment are hereby realleged and incorporated as though fully set forth herein.

2. From on or about January 31, 1981 to on or about February 7, 1981, both dates being approximate, in the Eastern District of Michigan and elsewhere, CHARLES F. COLLINS, Defendant herein, unlawfully and knowingly received, agreed to receive and solicited things of value from Edward J. Brown, to wit, hotel accommodations and subsistence at Canyon Ranch Resort, Tucson, Arizona from January 31, 1981 to February 7, 1981 and round trip air transportation between Detroit, Michigan and Tucson, Arizona, as well as other benefits, as a fee, kickback, commission, gift, loan, money and thing of value because of the actions, decisions and duties of CHARLES F. COLLINS relating to questions and matters concerning the Welfare Fund, to wit, the operations and administration of the Welfare Fund and the

approval of proposed welfare benefit Plans as described in Counts One and Two above in greater detail.

All in violation of Title 18, United States Code, Section 1954 and 2.

COUNT EIGHT

(18 USC 1954-- Receive and Solicit Fees, Kickbacks, Commissions or Money to Influence Operations of Employee Benefit Plan)

1. Paragraphs 1 through 16 of the General Allegations of this indictment are hereby realleged and incorporated as though fully set forth herein.

2. From on or about August 23, 1981 to on or about August 26, 1981, both dates being approximate, in the Eastern District of Michigan and elsewhere, CHARLES F. COLLINS, Defendant herein, unlawfully and

knowingly received, agreed to receive and solicited things of value from Edward J. Brown, to wit, hotel accommodations and subsistence at Canyon Ranch Resort, Tucson, Arizona from August 23, 1981 to August 26, 1981, as well as other benefits, as a fee, kickback, commission, gift, loan, money and things of value because of the actions, decisions and duties of CHARLES F. COLLINS relating to questions and matters concerning the Welfare Fund, to wit, the operations and administration of the Welfare Fund and the approval of proposed welfare benefit plans as described in Counts One and Two above in greater detail.

All in violation of Title 18, United States Code, Section 1954 and 2.

THIS IS A TRUE BILL.

_____

FOREPERSON

LEONARD R. GILMAN

United States Attorney

JOHN L. NEWCOMER

Special Attorney

Detroit Strike Force

940 Federal Building

Detroit, Michigan 48226

Telephone: 313-226-7252

Dated: December 21, 1984.

91-55

Supreme Court, U.S.
FILED
JUL 5 1991
OFFICE OF THE CLERK

No. 87-1284/2038; 87-1286/2072

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

FRANCIS R. FITZSIMMONS and

ROGER TOWNE (Petitioners)

-vs-

UNITED STATES OF AMERICA (Respondent)

APPENDIX

VOLUME II

RICHARD ZIPSER (P22747)
Attorney for Petitioner Towne
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HAROLD GUREWITZ (P14468)
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Petitioner Fitzsimmons
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18 USCS Section 1954. **OFFER, ACCEPTANCE, OR SOLICITATION TO INFLUENCE OPERATIONS OF EMPLOYEE BENEFIT PLAN**

Whoever being--

(1) an administrator, officer, trustee, custodian, counsel, agent, or employee of any employee welfare benefit plan or employee pension benefit plan; or

(2) an officer, counsel, agent or employee of an employer or an employer any of whose employees are covered by such plan; or

(3) an officer, counsel, agent, or employee of an employee organization any of whose members are covered by such plan; or

(4) a person who, or an officer, counsel, agent, or employee of an organization which, provides benefit plan services to such plan receives or agrees to receive or solicits any fee, kickback, commission, gift, loan, money, or thing of value because of or with intent to be influenced with respect to, any of his

actions, decision, or other duties relating to any question or matter concerning such plan or any person who directly or indirectly gives or offers or promises to give or offer, any fee, kickback, commission, gift, loan, money, or thing of value prohibited by this section, shall be fined not more than $10,000 or imprisoned not more than three years, or both: Provided, That this section shall not prohibit the payment to or acceptance by any person of bona fide salary, compensation, or other payments made for goods or facilities actually furnished or for services actually performed in the regular course of his duties as such person, administrator, officer, trustee, custodian, counsel, agent or employee of such plan, employer, employee organization, or organization providing benefit plan services to such plan.

As used in this section, the term (a) "any employee welfare benefit plan" or "employee pension benefit plan" means any employee welfare benefit plan or employee

pension benefit plan, respectively, subject to any provision of title I of the Employee Retirement Income Security Act of 1974, and (b) "employee organization" and "administrator" as defined respectively in sections 3(4) and 3(16) of the Employee Retirement Income Security Act of 1974 [29 USC Section 1002(4)].

(Added Mar. 20, 1962, P. L. 87-420, Section 17(e), 76 Stat. 42; Oct. 15, 1970, P. L. 91-452, Title II, Section 225, 84 Stat. 930; Sept. 2, 1974, P. L. 93-406, Title I, Subtitle B, Part I, Section 111(a)(2)(C), 88 Stat. 852.)

18 USCS Section 1961. **DEFINITIONS**

As used in this chapter [18 USCS Sections 1961 et seq.]--

(1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit

transactions), section 1029 (relative [relating] to fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section 134] (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to financial institution fraud), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to

unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), sections 2251-2252 (relating to sexual exploitation of children), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations)

or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving concealment, buying selling or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States, or (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act;

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes an individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership. corporation, association, or other legal entity, and any

union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity.

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate

usurious under STate or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter [18 USCS Sections 1961 et seq.];

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter [18 USC Sections 1961 et seq.] or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter [18 USC Sections 1961 et seq.];

(9) "documentary material" includes any book, paper, document, record, recording or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the

Deputy Attorney General of the United States, the Associate Attorney General of the Untied States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter [18 USCS Sections 1961 et seq.] Any department or agency so designated may use in investigations authorized by this chapter [18 USCS Sections 1961 et seq.] either the investigative provisions of this chapter [18 USCS Sections 1961 et seq.] or the investigative power of such department or agency otherwise conferred by law.

(Added Oct. 15, 1970, P. L. 91-452, Title IX, Section 901(a), 84 Stat. 941; Nov. 2, 1978, P. L. 95-575, Section 3(c), 92 Stat. 2465; Nov. 6, 1978, P. L. 95-598. . .)

18 USCS Section 1962.

PROHIBITED ACTIVITIES

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of

his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or though collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activates of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly in the conduct of such enterprise's affairs through a pattern of

racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

(Added Oct. 15, 1970, P. L. 91-452, Title IX, Section 901(a), 84 Stat. 942; Nov. 18, 1988, P. L. 100-690, Title VII, Subtitle B, Section 7033, 102 Stat. 4398.)

CONSTITUTION

OF THE

UNITED STATES OF AMERICA

AMENDMENT 5

Criminal actions--Provisions concerning--Due process of law and just compensation clauses.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT 6

Rights of the accused.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

United States of America

v ROGER TOWNE

EASTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION

Docket No. 84-20715

JUDGMENT AND PROBATION/COMMITMENT ORDER

COUNSEL

) In the presence of the attorney for the government, the defendant appeared in person on this date----------March 3, 1987

) ___ Without Counsel (However, the court advised defendant of right to counsel and asked whether the defendant desired to have counsel appointed by the court, and the defendant thereupon waived his assistance of counsel.)

) _x_ With Counsel: Richard P.
) Zipser

) ___ Guilty, and the court
) being satisfied that there is
PLEA) a factual basis for the plea.
) ___ Nolo Contendere
) _x_ Not Guilty

) There being a verdict of:
) ___ Not Guilty. Defendant
) is discharged.
) _x_ Guilty of Counts 2 and 3
) of the Indictment. And, on
) February 17, 1987, the Court
) having granted Defendant's
) Motion for Arrest of Judgment
FINDING) as to Count Three of the
AND) Indictment;
JUDGMENT) Defendant has been convicted
) as charged of the offense(s)
) of conspiracy to conduct the
) affairs of an enterprise

) through racketeering in
) violation of Title 18, United
) States Code, Section 1962(d).

) The court asked whether
) defendant had anything to say
) why judgment should not be
) pronounced. Because no
) sufficient cause to the
) contrary was shown or appeared
) to the court, the court
) adjudged the defendant guilty
) as charged and convicted and
) ordered that the defendant be
SENTENCE) hereby committed to the
OR) custody of the Attorney
PROBATION) General or his
ORDER) authorized representative for
) imprisonment for a period of
) three (3) years and fined the
) sum of Twenty-Five Thousand
) Dollars ($25,000.00). The
) defendant is ordered to stand

) committed until the fine is
) paid or he is otherwise
) discharged by due course of
) law.

) IT IS FURTHER ORDERED that
) defendant pay a special
SPECIAL) assessment of Fifty Dollars
CONDITIONS) ($50.00) for the use and
OF) benefit of the United States.
PROBATION) IT IS FURTHER ORDERED that the
) appearance bond of the
) defendant is continued pending
) appeal.

) In addition to the special
) conditions of probation
) imposed above, it is hereby
) ordered that the general
) conditions of probation set
) out on the reverse side of
) this judgment be imposed. The
) Court may change the

ADDITIONAL)		conditions of probation,
CONDITIONS)		reduce or extend the period of
OF	)	probation, and at any
PROBATION	)	time during the probation
	)	period or within a maximum
	)	probation period of five years
	)	permitted by law, may issue a
	)	warrant and revoke probation
	)	for a violation occurring
	)	during the probation period.
COMMIT-	)	It is ordered that the
MENT	)	Clerk deliver a certified copy
RECOM-	)	of this judgment and
MENDATION	)	commitment to the
	)	U. S. Marshal or other
	)	qualified officer.

Signed _x_ U. S. District Judge

By ___ U. S. Magistrate

_____

Ralph M. Freeman

Date: March 3, 1987

United States of America

v FRANCIS RICHARD FITZSIMMONS

EASTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION

Docket No. 84-20715

AMENDED

JUDGMENT AND PROBATION/COMMITMENT ORDER

COUNSEL

In the presence of the attorney for the government, the defendant appeared in person on this date--------October 16, 1987

___ Without Counsel (However, the court advised defendant of right to counsel and asked whether the defendant desired to have counsel appointed by the court, and the defendant thereupon waived his assistance of counsel.)

) _x_ With Counsel: Harold
) Gurewitz

) ___ Guilty, and the court
) being satisfied that there is
PLEA) a factual basis for the plea.
) ___ Nolo Contendere
) _x_ Not Guilty

) There being a verdict of:
) ___ Not Guilty. Defendant
) is discharged.
) _x_ Guilty of Counts 1, 2, and
) 5 of the Indictment. And, on
) February 17, 1987, the Court
FINDING) having granted Defendant's
AND) Motion for Arrest of Judgment
JUDGMENT) as to Counts One and Five;
) Defendant has been
) convicted as charged of the
) offense(s) of conspiracy to
) conduct the affairs of an
) enterprise through

racketeering in violation of Title 18, United States Code, Section 1962(d).

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that the defendant be hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of five (5) years and fined the sum of Five Thousand Dollars ($5,000.00). The defendant is ordered to stand

SENTENCE OR PROBATION ORDER

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) committed until
) the fine is paid or he
) is otherwise
) discharged by due
) course of law.

) IT IS FURTHER ORDERED that
) defendant pay a special
) assessment of Fifty Dollars
) ($50.00) for the use and
) benefit of the United States.
) IT IS FURTHER ORDERED that the
) appearance bond of the
) defendant is continued pending
) appeal.

SPECIAL) And on October 16, 1987, the
CONDITIONS) Court having ordered that the
OF) judgment of conviction
PROBATION) be amended to include
) the judgment of
) forfeiture relating
) to Count Two of the
Indictment;

) IT IS FURTHER ORDERED that as
) to Count that defendant shall
) forfeit to the United States
) the sum of Eleven Thousand
) Dollars ($11,000.00) pursuant
) to Title 18, United States
) Code, Section 1963(a).

) In addition to the special
) conditions of probation
) imposed above, it is hereby
) ordered that the general
) conditions of probation set
) out on the reverse side of
) this judgment be imposed. The
) Court may change the
ADDITIONAL) conditions of probation,
CONDITIONS) reduce or extend the period of
OF) probation, and at any
PROBATION) time during the probation
) period or within a maximum
) probation period of five years
) permitted by law, may issue a

) warrant and revoke probation
) for a violation occurring
) during the probation period.

COMMIT-) It is ordered that the
MENT) Clerk deliver a certified copy
RECOM-) of this judgment and
MENDATION) commitment to the
) U. S. Marshal or other
) qualified officer.

Signed _x_ U. S. District Judge

By ___ U. S. Magistrate

_____

Ralph M. Freeman

Date: October 16, 1987

or other person who is claimed to have been a member, willfully participated in the unlawful plan, with the intent to advance or further some object or purpose of the conspiracy.

To act or participate willfully means to act or participate voluntarily and intentionally, with specific intent to fail to do something the law requires to be done; that is to say, to act or participate with the bad purpose either to disobey or to disregard the law. So, if a defendant, or any other person, with understanding of the unlawful character of a plan, knowingly encourages, advises or assists, for the purpose of furthering the unlawful conspiracy--the unlawful undertaking or scheme, he thereby becomes a willful participant, a conspirator.

In order to prove that a defendant become a member of a

conspiracy to violate Section 1962(c) of the RICO statute, the Government must prove that the defendant objectively manifested, through his words or actions, his agreement to participate, directly or indirectly, in the conduct of the affairs of the enterprise, if any, through a pattern of racketeering activity. The Government satisfies its burden if it proves, beyond a reasonable doubt, either that the defendant agreed to personally commit two acts of racketeering or that the defendant agreed that another would commit two acts of racketeering.

One who willfully joins an existing conspiracy is charged with the same responsibility as if he had been one of

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

ITED STATES OF AMERICA,

aintiff,

ANCES RICHARD

TZSIMMONS, et al.,

Defendants.

Criminal

Action No.

84-20715

Hon. Ralph

M. Freeman

/

ORDER GRANTING GOVERNMENT'S

MOTION TO SEAL OFFER OF PROOF

The government having filed a

tion to seal and the court being fully

vised on the premises;

IT IS HEREBY ORDERED that the Offer

Proof and Attachment 1 be and is hereby

aled.

HONORABLE RALPH M. FREEMAN

UNITED STATES DISTRICT COURT JUDGE

ted: November 19, 1985.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

ITED STATES OF AMERICA,

Plaintiff,

ANCIS RICHARD
TZSIMMONS, et al.,

Defendant.

Criminal
Action
No. 84-20715
Hon. Ralph
M. Freeman

/

PROTECTIVE ORDER

The government having filed, rsuant to Rule 16(d)(1), Federal Rules of minal Procedure, a Motion in Limine for otective Order Regarding Defendant tzsimmons, and also having filed, in camera ex parte, an Offer of Proof Regarding dence as to Which the Government Seeks a otective Order together with Attachment 1, the Court, having reviewed all of the erial submitted, including the Defendant

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Fitzsimmons' Response in Opposition to such Motion, and the Court being fully advised in the premises;

IT IS HEREBY ORDERED:

That, although Attachment 1 would ordinarily be subject to discovery and inspection by the Defendant Fitzsimmons in accordance with Rule 16(a)(1)(A), Federal Rules of Criminal Procedure, because of the special circumstances in this case, as outlined in the Government's Offer of Proof Regarding Evidence as to Which the Government Seeks a Protective Order, discovery of Attachment 1 would not be necessary and appropriate, and would be deferred until such time when, because the special circumstances may have changed, it would no longer be necessary to restrict discovery of this material;

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That Attachment 1 does not contain ulpatory information within the meaning of dy v **Maryland**, 373 US 83 (1963).

That should the government elect to er this material into evidence during the al, or should they elect to use the erial during the presentation of any dence by the defendants, then discovery and pection of this material would no longer be erred and the government would be compelled disclose Attachment 1, pursuant to the cks Act, Title 18, United States Code, tion 3500.

Honorable Ralph M. Freeman
United States District Judge

ed: November 19, 1985.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v

CHARLES F. COLLINS,
FRANCIS RICHARD
FITZSIMMONS,
SOL C. SCHWARTZ, and
ROGER TOWNE,

Defendants.

_____/

Criminal Action
No. 84-20715
Hon. Ralph M.
Freeman

ORDER

At a session of the United States District Court for the Eastern District of Michigan, Southern Division, on January 13, 1987,

PRESENT: Honorable Ralph M. Freeman, United States District Judge

These matters having come before the Court on the motions of the Defendant, and upon reading and filing of the briefs filed by the parties and their oral arguments having been heard on November 26, 1986, and for reasons stated on the record on January 15, 1987, and in Memorandum Opinion, dated January 13, 1987.

IT IS HEREBY ORDERED that the following Motions of the Defendants, as listed below shall be, and are DENIED:

1. Defendant Collins' Motion for New Trial or in the Alternative for an Evidentiary Hearing.

2. Defendant Schwartz' Motion for New Trial.

3. Defendant Fitzsimmons' Motion for a New Trial Pursuant to Rule 33, Federal Rules of Criminal Procedure.

4. Defendant Towne's Motion for a New Trial Pursuant to Rule 33, Federal Rules of Criminal Procedure.

5. Defendant Schwartz' Motion for Judgment of Acquittal Pursuant to Rule 29(c), Federal Rules of Criminal Procedure.

IT IS FURTHER ORDERED that Defendant Towne's Motion for a Judgment of Acquittal Pursuant to Rule 29(c), Federal Rules of Criminal Procedure, or in the Alternative for Arrest of Judgment Pursuant to Rule 34, Federal Rules of Criminal Procedure, is DENIED as to all Counts of which verdicts of guilt were rendered against the Defendant Towne, except that Towne's Motion for Arrest of Judgment is GRANTED as to Count Three and DENIED as to Count Two of the Indictment.

IT IS FURTHER ORDERED that Defendant Fitzsimmons' Motion For Judgment of Acquittal Pursuant to Rule 29(c), Federal Rules of Criminal Procedure, , or in the Alternative, for Arrest of Judgment Pursuant to Rule 34, Federal Rules of Criminal Procedure, is DENIED as to all counts of which verdicts of guilt were rendered against

the Defendant Fitzsimmons, except that Fitzsimmons' Motion for Arrest of Judgment is GRANTED as to Counts One and Five and DENIED as to Count Two of the Indictment.

_____

Honorable Ralph M. Freeman
United States District Judge

Dated: February 17, 1987.

DATE OF TAPE:	5/1/85
FILE NUMBER:	
CASE AGENT:	CHRISTINE A. SIMPSON
TRANSCRIBED BY:	KARYN S. TRUDEAU - 8/19/85
REVIEWED BY:	CHRISTINE A. SIMPSON

5/1/85

LEONARD SCHULTZ - LS

FRANCIS RICHARD FITZSIMMONS (Dick) - FF

SA MICHAEL J. CARONE - MC

LS: I'll tell you, when he died, he owed, everybody gave him money I did too you know I got stuck for money too when he died. But ah, I remember you know your dad loved MAXIE.

FF: Mm hmm.

LS: You know your dad and MAXIE were very close. I once had lunch with your dad and MAXIE, I think what kind of a, and then I took him to the hospital he had a heart attack MAX. After we had lunch with your dad he, he, he, he, he, he got into a heart attack.

FF: What'd you do?

LS: I, I took him to the hospital. So what I'm tryin' to say is ya see it ain't like it use to be. There's nothin' no more out there. What do they say when ya sit in the can you wonder, and you

wonder what the fuck did I do to get in here. What the shit.

FF: Mm hmm.

LS: Now (unintelligible) calls it then there's no way out. This is nothing. Yesterday we were talking LARRY and I eh, you know how long are you gonna go like this here. Fuck it. Fuck these places. They got no fuckin' gun. Nobody, none of 'em. I'm tellin' ya DICK they won't do nothin' for ya. Hey, I wanna tell ya somethin' all they wanna do is if you're makin' a buck they wanna cut in and take it from you. Did ya hear me?

FF: Mm hmm.

LS: They wanna grab you.

FF: Well as I say ah, LENNY ah, a I, I meant it when I said that if, if I, if I do something ah, and ah, I was involved in these, in anyone of these fuckin' people I'm involved with.

LS: Yeah.

: If I knew any fuckin' thing they could have 'em.

: Yeah.

: You know 'cause what they're fuckin', they're fuckin' around with me just over the fuckinest pitiest goddamn shit and then I don't care how you know how you look at it or ah, un, I'm realistic enough to know that ah, they use, they use that ah, the first time I, I was sold, I was sold out the first time.

: There you are.

: So, see and now this time is ah, I'm not gonna get sold out because goddamn it they're, they're gonna have to prove it.

: Well.

: I, I would have been much better off the first time mother fuck it.

: Yep.

: But I thought I was protecting some people and ah, ah, doin' somethin' for myself.

: Yes.

FF: In the big picture and it didn't turn out that fuckin' way at all.

LS: Well that's where probably where you should ah, probably talk to somebody. You can't talk to your lawyer. You can't talk to your lawyer.

FF: No.

LS: You gotta go down to someone there confidentially sit down and say what can I do for myself (unintelligible) myself and get advice.

FF: Mm hmm.

LS: That's the way to do it.

FF: Well I don't know what the fuck I'm gonna do but I, I do know that I can't ah.

LS: You gotta do somethin'.

FF: I, I can't ah, stay like this. I was thinking of going down to Florida and ah, you know just ah.

LS: Well, you're still gettin' paid with FRANK, aren't ya?

FF: Yeah.

He, he says he would never let you down.

Mm.

He feels terrible. Well, but that's one thing about him. He's a straight guy, he's a honest guy like you.

Yeah, but you know see you could say the money is, is, is important because the fuckin' not, not that he's paid me that much.

Yeah.

But ah, it's the fuckin', ah, it, it's the jobs, see.

Sure.

Cause you know you can't do, you can't go on and on like okay now.

Can't, no one's gonna hire you, DICK.

Right.

No one's gonna hire you and I'm tellin' you DICK you just listen to me. You know when 1 got outta the can way back in the fa, you know in, in the fifties you know where I headed for, I went to gra, eh, I went to, when AL MC NALLY

sent me out to ah, Grand Blanc to mothball those machines and, and you work no heat and it was below zero weather and I still have to get up four o'clock in the morning and ride to Grand Blanc. I didn't get home until six o'clock at night.

FF: Mm hmm.

LS: For a hundred and fifteen dollars a week DICK. (Laughs) Shit you know what if I, if we had one day lay off I couldn't pay the rent. (Laughs) I told 'em I said what kind of job did you send me on? I can't make it. A hundred and fifteen miles I use to hustle I use to sell jewelry, billfolds, any goddamn thing. You know I hadda hustle to keep myself goin'. Well there were some days you'd work four days you know and, and then you'd have to go sit at the hall and sit on the goddamn bench and wait, right? When the, job ended, for another

FF:

LS:

FF:

LS:

FF:

LS:

FF:

LS:

one to start. And you sat there like a dumb idiot. Do you hear me?

Mm hmm.

You know and, and, and this is where we use to get sent and you know and now in those days like you'd go down to Cobo Hall and you'd probably go to work there right?

Yeah, well ah, that's where I'm going tomorrow.

Yeah you're goin' to work at Cobo Hall.

All right, so he helps you out ah, what's his name um.

MC NALLY.

MC NALLY helps ya out, but you know that shit's gonna hit the fan someday too over there. You know that's gonna hit the fan.

Well that's what I'm sayin' to ya.

That's why I, I, I the only.

You know what's gonna happen all ex-convicts are workin' there at Cobo Hall.

FF: Right.

LS: See every guy who comes outta jail goes to work over there.

FF: And so I just think I'm just go down to Florida and look around see what I can find.

LS: What are ya gonna find down there?

FF: I don't know, the ah.

LS: You can't fly back and.

FF: I can't find nothin' here.

LS: Forth here for trial.

FF: You know I can't find nothin' here. You know and I can't eh, I can't survive another fuckin' year here waitin' for the trial.

LS: That CHUCKIE he sure got away with murder that CHUCKIE O'BRIEN. I'll tell ya somethin' you know he's nothin' you know what I gotta tell ya somethin' what he tried to do to me and my kids well TONY was at the club that day and what happened when this thing came down he told them and some reporters eh, that he

was at the club. Follow? And then what happened they asked me if he was at the club, not the reporters, I think it was an FBI Agent or some police the police did. I says I don't know I'll ask my kids so I went to the damn phone and I called my kids up and I said was CHUCKIE O'BRIEN at the club? They said no dad ah, he wasn't here all day he had, he was nowheres near around the place and what happened we told the reporters he wasn't here but then he came and he bitched what the fuck's wrong with your kids why didn't they cover up? I says hold it just a second. If you were at that club my kids would say you're at the club. If you weren't at the club my kids would say you weren't at the club and you and nobody else is gonna have my kids go before a grand jury and lie and put 'em in jail for perjury you go fuck Yourself CHUCKIE O'BRIEN. Did ya hear, I told him that and then I told TONY so

TONY got mad at him cause TONY knows that he wasn't at the club. I said TONY what is this shit with you guys? I says ya come here and you use us, you know what I mean at the club what do you think they, they just used us at the club I said now this guy wants my kids ta lie. Fuck him. He says yeah he says, he said forget it don't worry about it. I says fine I said you know hey come on those are my kids you don't put my kids through that, that shit, shit you know I don't go for that. I'd rather be dead than have my kids go up there and lie but this is what he's tryin' ta do that punk.

FF: Mm hmm.

LS: Then he comes over there one day, my kids called me up he came in then he signed cards new members JIMMY HOFFA, his son and him. Bill it to the Teamsters Local 299. So my kids call me and says guess who joined the club? I

said who's that? He says JIMMY HOFFA and his son and CHUCKIE O'BRIEN. I says and who's gonna pay for it? He says ah, he told us to charge it 299 I said if you ever collect that one I says I'll eat your hat. I says I will bet a million dollars ta a dollar that JIMMY HOFFA don't know that he joined the club and that his son don't know it. Nothin'. That this guy ga, went and pulled this shit. First of all JIMMY HOFFA's on parole, right?

FF: Mm hmm.

LS: How in the hell can he join the club and charge it to 299? He'll go to jail again. I said, I told my kids you, this guy you know he, he's a psychopath he's nuts he'll do anything you don't, you don't know he's crazy.

FF: Yeah.

LS: He's crazy and he's suppose to be you know the closest to JIMMY, close my ass, you know.

FF: Yeah.

LS: He turned, he turned, come on DICK right or wrong that cock sucker he turned. He's a piece of shit. That CHUCKIE O'BRIEN. You know how many times he's embarrassed people? He went up to the deli and some party store and they bought meat they use to buy these steaks and then he went in there and told the guy's son and then he went and charged up nine hundred and somethin' dollars worth of steaks and never paid the guy. The guy called me up he says who is this guy? I says I didn't send him to ya, but that is, that's the way that guy is you know what I mean? Fuck loyal. Uncle TONY everytime that he's around TONY it's Uncle TONY and Uncle this and Uncle that. No that's no kind of shit. Well like I say ah, everybody's had their problems with that guy. You had your problems with him too.

FF: Oh yeah.

LS: Huh? Fuck look at the problems. And he got away with murder that kid. That kid got away with murder and look murder he's, he's back there workin' for MORGAN in Florida, right?

FF: Mm right.

LS: And ah, he's got it made now. He's got it made he's being taken care of pretty good.

FF: Well listen, LENNY, if you ah, ah.

LS: I know I know you called me, you called me for a reason, right?

FF: Ah.

LS: What, what are ya looking for somethin'?

FF: I'm ah, no I wanted you to, ah, eh, if you know this guy KATZ (phonetic) to go and fuckin' tell him somethin'.

LS: Talk to him? I know.

FF: Just tell him to shut his fuckin' mouth.

LS: Yeah, I know SAM real well.

FF: Yeah.

LS: You know what I mean. And ah, yep you know. Why is SAM is doing that? Does he...

FF: That's what.

LS: Have a deal with these guys?

FF: That's what I'd like, I'd like you to find out.

LS: Alright. Must have a deal with these guys here.

FF: See I'm thinkin' even if he ah, you know he, thinkin' ah, okay ah, SAM does this, does that and if you go to him and.

LS: Does he get their mailing business?

FF: Does BOB?

LS: You know mail.

FF: Yeah.

LS: Oh I see. BOB who?

FF: And ah, if, if.

LS: BOBBY HOLMES?

FF: BOBBY done what he says, he says he'd have a talk with 'em. But ah, just as late as ah, two weeks ago, three weeks ago, and the same shit happened.

LS: Yeah.

FF: After all that's what I'd wish you'd do is ah, you know and if ya hear somethin' let me know.

LS: Ya know yeah I'll let ya know give ya a call but I gotta tell ya somethin' DICK, you better put your thinking cap on. Save yourself. I'd, I'd hate to see you go from twenty five seasons. You're, you're gonna die there DICK.

FF: Yeah.

LS: How old are ya now?

FF: Fifty five.

LS: You're gonna die there. Come on. What the fuck, what is this here? You gotta be nuts, you gotta be nuts. I wanna tell you something (unintelligible). Whew! And it's a hell of a thing to tell your wife you know, hey, I think you go ta, you know. You don't want that ta happen.

FF: No, I don't want it. But then, hey, I gotta be real LEN.

LS: (Unintelligible)

FF: They, you know, Jesus Christ, ah...

LS: Can't take her life up either.

FF: That's right.

LS: You know what I mean. That's being selfish. That's being selfish.

FF: You know you're married thirty-five years, thirty-six years for Christ's sake.

LS: Sure that's selfish.

FF: And, and after, after thirty six years.

LS: And she's such a nice gal your wife.

FF: Yeah ah, ya wind up with nothin'. You don't even I, I ain't got no fuckin' pension I got nothin'.

LS: You got no pension either?

FF: Nothin'.

LS: You're kidding?

FF: No.

LS: I can't believe, you mean you didn't wind up with nothin'?

FF: Oh I wound up with ah, a lump sum settlement.

LS: Yeah.

FF: Hey but what the fuck hey that fuckin' thing . . . (unintelligible).

LS: It's gone.

FF: . . . cost me.

LS: No it just cost ya money.

FF: It, it'll cost me my girls gettin' married cost me, you know.

LS: You better do something for yourself pal. I'm tellin' ya, ya better put your thinking cap on here and, and start the worrying about DICK FITZSIMMONS a little bit.

FF: Mm hmm.

LS: 'Cause ain't nobody out there worryin' about you.

FF: That's, that's true.

LS: Ya know? Ya know I gotta tell ya somethin'. You, you, you can do yourself a lot of fa, eh, ah, a lot of harm just by doin' a lot of favors for nothin'. Those are the ones that are killers.

FF: Well hey I, I can't do any favors well fuck eh, I, I'm.

LS: Not no more.

FF: Not in the position to do any.

LS: Not no more, I mean you know.

FF: The, the thing is, is just the way, the way I kinda look at it LENNY okay you fuck me.

LS: You'll get in all kind of trouble.

FF: Ya fuck me, ya fuck my future, ya fuck me ah, ah, my livelihood ya fuck me, hey why the fuck don't you leave me alone.

LS: Yeah, right, right, right, right.

FF: Let me, let me get on with livin'.

LS: That's right, that's right.

FF: You know.

LS: But they won't. Nobody's gonna let you do that.

FF: That's right.

LS: Ain't gonna let up no. I'll tell ya somethin'. I gotta tell ya somethin'. There ain't nothin' more nicer than goin' home and go ta sleep peaceful and.

F: Right.

S: No one knockin' on your door. Remember it's a pleasure.

F: Sure.

S: You know what hindsight is twenty twenty vision.

F: Well that's the way I felt you know.

S: Mm.

F: With this deal with FRANK you know and, and then fuckin' whenever the, like I told.

S: IS COLLINS indicted on this one too?

F: Yeah.

S: Him too.

F: Sure.

S: You know he, he's, he's a, he's a heelin' dealin' kid.

F: Fuck, he's ah, he's ah, ah, suppose o be going away ah, on his other sentence.

S: Yeah.

F: It's under appeal.

S: And he might have a problem with this ne here too.

FF: Right.

LS: No one knockin' on your door. Remember it's a pleasure.

FF: Sure.

LS: You know what hindsight is twenty twenty vision.

FF: Well that's the way I felt you know.

LS: Mm.

FF: With this deal with FRANK you know and, and then fuckin' whenever the, like I told.

LS: IS COLLINS indicted on this one too?

FF: Yeah.

LS: Him too.

FF: Sure.

LS: You know he, he's, he's a, he's a wheelin' dealin' kid.

FF: Fuck, he's ah, he's ah, ah, suppose to be going away ah, on his other sentence.

LS: Yeah.

FF: It's under appeal.

S: And he might have a problem with this one here too.

F: This one. He got a public defender.

S: Well he got no money? Who's he got?

F: I don't know. A public defender.

S: I wouldn't, I'll tell ya somethin' DICK I wouldn't feel too comfortable just because a guy come outta the Attorney General's Office at.

F: Oh eh, hey I'm not comfortable but.

S: He's ah, he's just a lawyer.

F: Ya know and, and ah, I searched around ya know fuck I, I, I, I wasn't gonna use CLYDE 'cuz I didn't think ah, he, he's got enough zip ah, he maybe good ah, ah, ya know.

S: He tells ya he has connections but he doesn't.

F: Yeah.

S: He always tells ya I got, hey I know this guy and I know that guy.

F: So this guy is a good.

S: Hey.

FF: Trial lawyer.

LS: Bullshit.

FF: And, ah, ah, that's what ya gotta have and.

LS: All ya gotta have. Ya gotta have yourself. (Laughs)

FF: Good job.

LS: He's only as good as you are. Okay, listen I'll, I'll if I see SAM I'll run into him I'll tell him.

FF: Tell him.

LS: Yeah I'll talk to him. All right, my man I'm sorry to hear it really.

FF: Yeah.

LS: Honest to God, it's a shame. Your brother DON is doin' alright though, huh?

FF: Oh yeah.

LS: Ah huh, he's keepin' his nose clean I hope, huh?

FF: Oh, sure. Yeah.

LS: No more fuckin' around huh?

FF: Right.

LS: Yeah . . .

FF: When did he ever fuck around?

LS: Yeah, him, you know, all he likes is the broads.

FF: Yeah.

LS: Huh? With the girls.

FF: Okay LENNY.

LS: Take care of yourself.

FF: Alrighty.

LS: Lots of luck.

FF: Be good.

LS: Yeah I wanna talk to MARTY ya see.

FF: Yeah.

LS: Ya hear me.

FF: Mm hmm.

LS: Okay.

FF: Okay.

LS: Take care.

(Noise)

(Pause)

(Dialing phone)

(Pause)

LS: Yeah ah, Mr, CARONE or a Mr. INSOGNA please Mr. SCOTT could you tell him to gimme a call ah, that ah, I'd like to see him in my office. Alrighty.

(Hangs up phone)

(Dialing phone)

LS: (Coughs) Yeah, MIKE BANE please. When is MIKE in, I've, we've been missing each other. I've been callin' him for the last few days. He called back I'm not in, then I call back he's not in why don't you do this here for me please ah, if you hear from him ah, within the next half hour or so would you have him call three, five, three, seven, four, nine, four and ask him if he does, if he misses me and I miss him to call me at eight, five, one, one, four, three, oh after three o'clock and tell him Mr. SCHULTZ, S,C,H,U,L,T,Z. Eh, right. No, no honey after three o'clock. After three o'clock. Yeah if he calls in, alrighty? And appreciate if very much.

Thank you. He's on the road? Alright well who, who sings that song WILLIE

91-55

(5)

Supreme Court, U.S.
FILED
JUL 5 1991
OFFICE OF THE CLERK

No. 87-1284/2038; 87-1286/2072

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

FRANCIS R. FITZSIMMONS and

ROGER TOWNE (Petitioners)

-vs-

UNITED STATES OF AMERICA (Respondent)

APPENDIX

VOLUME III

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Telephone Conversation of 5/1/85

(9 a.m.). 132

DATE OF TAPE: 5/1/85

TIME OF TAPE: 9:00 A.M.

FILE NUMBER:

CASE AGENT: CHRISTINE A. SIMPSON

TRANSCRIBED BY: SUSAN G. DAKIN - 8/20/85

REVIEWED BY: CHRISTINE A. SIMPSON

ATTACHMENT D

5/1/85

9:00 A.M.

LEONARD SCHULTZ - LS

FRANCIS RICHARD FITZSIMMONS - FF

Note: Initial portion of tape recording was used for testing by Agents INSOGNA and CARONE. Tape starts at 8:30 a.m., but transcription begins with FITZSIMMONS entering SCHULTZ' office for 9:00 a.m. meeting.

LS: DICK, how ya feelin'?

FF: Good, and you?

LS: Ya look good. Hey, you're on time almost.

FF: I am?

LS: Huh?

FF: Oh, my...

LS: Are you usually on time or not?

FF: Yeah.

LS: Huh?

FF: Yeah.

LS: Leave me...I wanta close this door so no (unintelligible). 'Cause I get interruptions. And people come in, you know, back an' forth, so what the hell. I'm surprised, you, you know you called me. I'm surprised. What's cookin'? Tell me. You look good. Huh?

FF: What's cookin'? Nothin'.

LS: Nothin' cookin'? I, you know, I ran into, ah, FRANK. I was having lunch and he was telling me of the problem, you know, you have. This problem, that problem with, ah, with that limousine service and...you know, I was talkin' to,

ah, JOE BANES prior to here just now. They do that, ah, hauling of, ah, cars and everything. They, ah, they did, they took, ah, my car. I'm scared to drive it when I head down to Florida. I had a lotta problems with it over there. And, you know, you take 'em, you take the car and they see an' out of town guy and for four days they had me comin' back and forth. All I wanted was new fan belts, change the oil, new filter and that's it. Right?

Hm hmm.

So, come to, ah, close to two hundred somethin' dollars they charged me. My wife and I are goin' out to dinner and we get stuck right on Ocean Drive. And,

you know, if you get stuck on Ocean Drive with all them cars there. Finally, I could barely get it into a lot there at one of the hotels and had ta leave it there and no place around ta get someone to fix it, that's at night. So, what happened, I called the guy up the next morning, they towed it in, towed it in. They tell me that the battery's down. I said, "How can the batter be down if I'm driving to, it's generating, right?" I says, "Maybe the guy made a mistake and with the fan belts he didn't tighten?" "No, no, no." Anyhow, for four days I went through this here and every time I, I came there, you know, they're havin' to lease a car. They charge ya twenty

FF:

LS:

bucks, give ya forty miles, then ten cents a mile. So, it cost me money for leasing a car. And they tell me all was wrong is the battery had ta be charged for two hours. But they lied. You know they lied. The guy probably didn't tighten up the belt to the... Alternator.

...generator. Ya, al-, the alternator and that's what it was. So, my wife and I usually drive the car back. You know, just take, you know, spend a few days just ridin', lookin' at the scenery. So, what happened, I says to her, "I'm not taking a chance of gettin' stuck." So, I called 'em up and, ah, they took the car back for me. And, ah...

FF: What's he charge for that?

LS: Oh, well, they charge, actually they charge four hundred fifty or four hundred bucks, but he gave it ta me for three fifty 'cause they took it down and I never got, you know, do I have to tell ya about JOE BANE? I, JIM, do you know JIM? His partner?

FF: No.

LS: Okay. Anyhow, those guys, you know they're robbers. And, what happened is, ah, ah, they charged me four fifty and I gave 'em the car a week ahead of time to make sure that it would get there. And it got there a week later. I had no car and I'm going nuts and they tell me any minute. I, I was calling and "When's the car comin'

in?" Call back and forth, back and forth. It should be in. Anyhow, here comes two guys drunker n' hell, with, with this trailer. I told him, "Here, do me a favor, don't take the car off. I'll take it off myself." I had ta get in and take it off because they were gonna smash it all up taking it off. They were drunker than a loop (phonetic).

FF: No shit?

LS: I'm tellin' ya, drunk. How the hell they can put these kinda guys on the roads is beyond me. They'll kill somebody. You know? Terrible. And I called him back up and said, "I don't know who you got drivin' for you, but those guys must've hit some back roads or

somewhere. My car, had ta take it through a car wash three times ta get the dirt off of it. I don't know where they were with that damn trailer." But that car was filthy like you never seen.

FF: Huh.

LS: I mean the roof. Hey, ya couldn't even scrub it off. But I went through three times for a car wash to get the damn dirt off. I've never seen anything like it. I said, "Where in the hell were you guys?" "Aw, we were laid up." "Laid up", I said, "You look like a plowed (phonetic) up right now." "Well, sorry, sir."

FF: Well, I understand JOE's doin' pretty good in that?

LS: Yeah. Well, he gets into everything from what I gather. He's into this trucking and he's into, ah, backing up fighters and he's backing up this and he's backing up...you know, he's gonna back himself into, into a hole. (Laughter)

LS: He's nuts, you know. He's into everything. You know, he, he, you keep talkin' about and, and like I'm trying to call, ah, MIKE BANE and I've been calling for three, four days and we keep mees (phonetic), missing each other. So, what happened is, don't the TEAMSTERS have money for extra phones up in Pontiac?

FF: I know, yeah, it's a...

LS: Is that a broke union?

FF: That's a goddamn, that's a shame up there.

LS: What's, what's going on there?

FF: Nothing. It's a...

LS: They don't have no telephones...what is this?

FF: No, there, there's no leadership up there.

LS: Oh. Well, MIKE'll take over.

FF: That's right. If he, you know, like I told him whenever he went back there, "Just go in there and do your job and, you know, and..."

LS: He'll probably take that union over.

FF: Yeah, because, uh, SIMON er, ah, SIMMONS...

LS: Yeah?

FF: Is that who the president of the union is? Ah...

LS: Who's WALKER?

FF: WALKER. WALKER.

LS: WALKER. That's what I heard.

FF: Yeah, he's, ah...This is his last term.

LS: Oh. So, he'll be takin' over?

FF: Hm hmm.

LS: You'll be in good shape.

FF: Hm hmm.

LS: Be the head man. The head honcho. God forbid. (Laughs).

FF: You're right.

LS: (Laughs). God forbid, huh?

FF: Yeah.

LS: There goes Oakland County.

FF: I know.

LS: Huh?

FF: No, he's settled down a little bit.

LS: You think he's settled down.

FF: Yeah.

LS: Huh? I hope so.

FF: Yeah, he's settled down.

LS: Huh?

FF: Well, he says he's settled down.

LS: Yeah. What's happening with you?

FF: Nothing.

LS: So, what, what are you, what do you do? You know, FRANK was really concerned. You know, you got a good friend in him.

FF: Well, you know, what happens is, is, you know, the thing is kinda political.

LS: Yeah.

FF: You know that thing I referred to.

LS: Yeah. You mean the one that you're indicted on?

FF: No. This, this Commuter Limo.

LS: Oh, the Commuter Limo (unintelligible).

FF: It's kinda, it's kinda of political, ah, if you want to make it that way.

LS: Yeah.

FF: And that's, you know, that's FRANK's bag.

LS: Right.

FF: So, what he does is, ah, instead of just takin' a little bit, he goes in there and he, he wants, you know, he, he's gung-ho, right?

LS: Yeah. Well, he's an ambitious businessman.

FF: Yeah.

LS: And he's a sucsec, sus-, very successful.

FF: Yeah. So, anyway, ah, ah, we got into the airport and, ah, he wants to go in it now and, you know, and

just take over the whole fuckin' thing.

LS: Yeah.

FF: And, and, and it's political.

LS: Yeah.

FF: And, ah, you know, that, uh, that deal with SHORTWAY, ah, they fuckin' lie. You know, when I left SHORT, I went 't work with SHORTWAY, right, I was promised, I was promised a fuckin' raise, right, in six months.

LS: I thought you were the President of that company?

FF: Oh, fuck.

LS: Or was that a farce?

FF: It's a fuckin' farce.

LS: No kiddin'?

FF: You know I was promised this, promised that.

LS: Who owns SHORTWAY?

: Ah, MARGOLIES.

: MARGOLIES? Is that, not the guy at GREYHOUND?

: No.

: No?

: No. The guy that, that used to be at GREYHOUND is a guy by the name of WIGHAULER (phonetic).

: Yeah.

: Okay, now he left GREYHOUND about, ah, oh, maybe ten years ago and went with SHORTWAY.

: Yeah.

: And he is the, uh, he's in with MARGOLIES.

: I see.

: Yeah. And they made all these fuckin' promises and, uh, they just beat me to death. Shit. Ah, they

got me workin' for twenty-five grand a year.

LS: Oh, God.

FF: I'm workin' seven days a fuckin' week.

LS: Huh.

FF: Fourteen hours a day and everything's my fault.

LS: Oh, yeah, one of those deals, yeah.

FF: You know, it's, uh, hey, run this company. The company's yours. You do it. Okay, fine. Well, give me some equipment.

LS: Yeah.

FF: You know, give me some, uh.

LS: Yeah.

FF: Let me run the company and, and just, just give me some equipment and I'II set their operation.

LS: Yeah.

And, and then the fuckin' bill collectors started comin' and then I'd say, "Well, I can't help you." "Well, you're the president."

Mmm hmm.

I'm terribly sorry, I'II do the best I can, ba-ba-ba-ba-ba.

Yeah.

And...

In, in other words, they let you be the front guy...

Yeah.

...ta, ta make a fool out of ya and you take all the steam for everybody.

Right.

DICK, (laughs).

So, anyway.

I don't know. How do you get into these things?

FF: It's, it's shit.

LS: Huh?

FF: It's just shit.

LS: Yeah, you're being used.

FF: And, uh, the fucking guy, uh, uh, finally they, you know, they, they, here's what happens to me. They, they took, uh, Ann Arbor, which is a very lucrative part of the operation. It's part of the operation that they, uh, you know, that they got from the old, uh, uh, Airport Services.

LS: Yeah, from LENTILE.

FF: And see, they're not, they're not, uh, this type of business people.

LS: Yeah.

FF: They're bus people.

LS: I see.

They, they, they, they know buses. Why, they understand buses and how ta...

Did they buy it from LOUIE LENTILE?

Yeah.

They bought it?

No, no, they didn't buy it from LOUIE LENTILE. They bought it from the bank.

From the bank?

Right.

Oh, the Pontiac bank. That's...

BATTANI (phonetic) stole it.

They stole the company.

Six hundred and sixty thousand dollars.

Yeah, you can't, you gotta be kiddin'.

That's what they bought.

LS: That thing was worth a lot more money.

FF: Oh Christ, they'd, they'd sold the, they, they'd sold the buses off and got their money back.

LS: And they had property, too, didn't they?

FF: No.

LS: No property with the buses?

FF: No.

LS: Then they musta had him with that guy in the bank.

FF: Right.

LS: They musta paid him off pretty fair, boy. (Laughs). He was a black sort of a guy, (unintelligible).

FF: I don't, I don't, I never, I wasn't at the company when they bought it. But anyway, that, that was the

story, so anyway in Ann Arbor, uh, they're renting a service. So, they says, "Okay, here DICK, we're gonna, we wanta institute a, a scheduled service, a line run service."

LS: Yeah.

FF: I says, uh, "Well, what are you gonna do with, with, uh, you know, there's twenty-one hotels in Ann Arbor and they all, you know, they all have their ups and downs, right?"

LS: Yeah.

FF: Now, if you're gonna hit six of 'em, what the fuck is the rest of the hotels gonna do?

LS: That's right.

FF: So, I started puttin' some feelers out and these fuckin' hotels were

just, they're gonna start their own. If SHORTWAY cuts them off they're gonna go out and fuckin' start their own.

LS: Yeah.

FF: So, I think to myself, well, fuck, that's a good, good shot. I says I, MIKE and I talked a little bit and, uh, so I start my own. Well, because I started my own, I become a competitor of theirs and they don't like competition.

LS: Oh.

FF: So, I become every dirty son of a bitch, you know. They, they, I know, now I realize why they brought me in. They brought me in to get rid of MIKE.

LS: Yeah.

FF: They brought me in to get rid of MITCH GENTILE.

LS: Yeah, yeah.

FF: And, uh, and actually be a front guy, uh, because of the problems, uh, you know, with 614 and...

LS: But then you...

FF: ...so forth and so on,

LS: Yeah, and you can take care of it. Yeah.

FF: And, and they beat ya to death and...

LS: Yeah.

FF: ...and they don't pay ya. So, that's what happened. So that's why I left 'em. Now, when I went with FRANK.

LS: Was that organized with 'em?

FF: Yeah.

LS: So, they got a break, uh, with...

FF: Well, fuckin' right. Jesus Christ. Uh, uh, they never had any fuckin' problem.

LS: No kiddin'? Just give 'em passes.

FF: Yeah.

LS: Oh, that's incredible. What a deal.

FF: So, anyway, they, the, the goddamn thing goes and, and I go to work, uh, I go to work and FRANK, you know, I met FRANK. I don't know where the hell FRANK, I ran across FRANKLIN. And I was telling how I was getting very fed up with this fuckin' company because this cock sucker was just fuckin' me around and, you know, when I work for somebody, I, I, I keep everything...

LS: You care about it.

FF: ...ta, ta heart, ya know.

LS: Right.

FF: These fuckin' phone bill, LENNY, I spend six hours a day talkin' to creditors.

LS: (Laughs)

FF: Suing me.

LS: No kiddin'?

FF: And I, I'd call, uh, WIGGINBOWER (phonetic) and, or MARGOLIES in Toledo.

LS: Yeah.

FF: Fuck 'em. Let 'em sue us.

LS: Who are these guys? Are they connected with anybody?

FF: No.

LS: You mean straight guys?

FF: They're, they're shitheads.

LS: Yeah.

FF: They, they probably got some things goin' here and there, but, you know.

LS: They're out of Toledo.

FF: Yeah.

LS: Sick.

FF: So, anyway.

LS: What, they had a limousine service there, too, or what?

FF: No, they got a bus service.

LS: Bus service outta there.

FF: Right.

LS: So, they must have good connections...

FF: Yeah.

LS: ...down in Ohio and here.

FF: Here and there. They go pretty good.

LS: They go pretty good.

F: So, anyway, the fuckin', uh, deal comes out where I leave that and start this little service. Okay, I says, "Hey, FRANK, it's not gonna take too much money." I started up, but the secret of the business, the secret of the business, you gotta run both ways. You can't run just from Ann Arbor. Anybody can run from Ann Arbor into the airport.

S: Yeah.

F: You got to run back. You gotta have permission to come out of the airport. Why, fuck, I ain't got the (unintelligible) of the airport, and I ain't got my connections. Hey, LUCAS, da-da-da-da-da. Terrific, so we took a little shot and, uh.

LS: Are you good with LUCAS?

FF: Well, I, you know, how do I know? I never fuckin', ah, I never got involved in that shit.

LS: Yeah. But out at the airport, you had what's his name, HARRY's, ah, son-in-law. He's out there, isn't he?

FF: Yeah, he's a...

LS: What's his name?

FF: ...cock sucker.

LS: Yeah?

FF: A fuckin' cock.

LS: What's his name again?

FF: Uh, wait a minute.

LS: I use ta, you know, with the blood pressure machines that are out there.

FF: Yeah, wait a minute. Uh, what the hell is his name? Young guy.

Yeah. TIM WARD.

TIM WARD.

Yeah, TIM WARD. Yeah, yeah, TIM WARD, that's his name.

Yeah, cunt.

No kiddin'. Hmph.

So, anyway, um.

But don't forget his father-in-law, BARRY, was real close with, uh, JIMMY. And they were probably with your dad, too, at that time.

Well, it, it never got to the, it never got to the point, but see, the way FRANK does things.

Yeah.

He does them and then goes get permission.

Yeah.

FF: And I'm not, I'm saying that's, that's probably the way to do things.

LS: Right.

FF: Uh, so instead of laying all, eh, the groundwork was laid when we went into the airport.

LS: Right.

FF: Right? All we were gonna do is run Ann Arbor and run the east side. You know, SCOTT, you know, the SCOTT, uh, uh, father and son out there.

LS: (Unintelligible)

FF: BUFFALINO'S friend.

LS: (Unintelligible)

FF: He owns that, uh, PARK CREST HOTEL.

LS: PARK CREST, yeah.

FF: Yeah, and GEORGIAN INN.

LS: Yeah.

Okay. I got that, see. So, that was gonna be the makings of the business. And with them two fuckin' runs, right?

Yeah.

Just, you know, slowly.

Yeah.

Piece this thing off. Don't try to do it all in fuckin' six months, but slowly.

But that supported your business.

Yeah, but the, the support was gonna be...

Yeah.

...the Ann Arbor. That was the most, the most lucrative run they had was Ann Arbor.

Yeah.

And the most, second most lucrative run they had was the east side.

LS: Yeah.

FF: And let them fuckin' have the rest and just...

LS: Yeah.

FF: ...let 'em just take care of those two. Burn themselves up and they'll fuckin', they'll quit.

LS: But now do you have 'em?

FF: Oh yeah, we got 'em.

LS: Well great. That's good. I'm glad to hear it.

FF: Yeah. I got 'em.

LS: Oh.

FF: You, you know, I got 'em when we originally started this.

LS: Oh.

FF: But then FRANK in, uh, uh, the last three months is a, he wants to run downtown, uh, he wants ta, you know, do this.

Well, he's good business for ya.

Oh. What I'm sayin'.

He's smart.

He's the kinda guy that, he does things and goes and gets permission.

Yeah.

Okay? And that started the shit.

Okay, when he started that, SHORTWAY went completely fuckin' crazy. They went out and they did this and they did that and they did this. Okay, and we fought 'em all, hey, all the way up the fuckin' line.

Yeah, okay.

Here about three months ago. You know SANTEZ (phonetic).

SANTEZ? Yeah, yeah, I heard of 'em. You mean from the printer?

FF: Yeah.

LS: Yeah, SAM.

FF: That little fuckin' SAM,

LS: SAM, he's a, he's a real politician. He's in with all the...

FF: Yeah.

LS: ...the governor and everybody.

FF: Well.

LS: Mail service.

FF: Yeah, that, that's right. AMERICAN MAILERS.

LS: Yeah, AMERICAN MAILERS. He was my neighbor in Franklin.

FF: Yeah. So, anyway, he's a friend of MARGOLIES.

LS: Oh my god. Don't have to tell me...

FF: And now the shit starts. I'm a son of a bitch.

LS: You're kiddin'. SAM did this?

FF: (Unintelligible). So, I talked to BOB and, and BOB said, "Oh, fuck it, he, he just, he just talks and, and he..."

LS: Yeah, but he's in politically with everybody...

FF: But he's...

LS: ...and he's gonna still talk.

FF: ...he's, he's into, you know.

LS: Come on.

FF: I says FRANK, "Hey, BOB, the guy's killing me. "And I ain't, I, you know, I, I, I've seen SAM KATZ. I never went ' one way or the other. I could give a...

LS: Let me tell you somethin'. When they all belonged to the club, they use to come to the club.

FF: Yeah.

LS: To my son's club. You know, they use to sit there and pick who's gonna be governor, who's gonna be this or what. I don't know how authentic it was, but, uh, they use to sit there and talk, you know, uh, who use to come there? The judges and, uh, what, what's his name, that SZYMANSKI (phonetic)? What, what's his name, SZYMAN-? That Judge SZYMANSKI.

FF: SZYMANSKI.

LS: Yeah, SYMAN-, a big heavy set guy.

FF: Yeah, a big guy.

LS: He was a football player or what was he?

FF: No, he was just a, a, SZYMANSKI, that was OTTO WENDEL's.

LS: Oh.

FF: Good pal.

LS: Ah, ah, OTTO WENDEL's pal?

FF: Yeah.

LS: Oh, shit. But they use to come there, uh, all the time. I, you know, I never bothered with 'em, but, uh, they use to sit there. They, hey, they acted like king makers, these guys.

FF: Mm hmm.

LS: But, uh, I know SAM real well. So, what does he do, SAM?

FF: Well, he, he, now, he's a friend of MARGOLIES. He don't know a fuck, uh, he don't know nothin' about nothin'. And like I said, "Hey, BOBBY. Tell 'em to get the fuck off my ass." Because...

LS: He's a good friend of BOBBY HOLMES.

FF: I, I, eh, eh, I hear.

LS: I'm telling you that.

FF: Now hey, now BOBBY HOLMES thanks me...

LS: BOBBY HOLMES 'n SAM KATZ is real...

FF: Hey, tells me fi-five weeks ago, six weeks ago.

LS: Yeah.

FF: Yeah, maybe six weeks ago. FRANK comes to me and he says, Hey, who is this fuckin' SAM KATZ?" And I says, "Oh, Jesus, I, I, I don't know. I know he's, I've seen him all around, you know, he, he comes down to see BOBBY. He gets involved in political shit."

LS: Oh yeah, he's, he's friendly.

FF: And does everything, right? Yeah, oh yeah. He's a good friend of BOBBY's. I says, okay. Yeah, now that you mention it, yeah. I see him a lot with BOBBY.

LS: Right.

FF: So, I says, "BOB", I met BOBBY at the airport one morning. He was catchin' a flight at METRO at seven o'clock or seven thirty. So, we went to that, uh, AMERICAN AIRLINES there and we sat and talked and I told him what was goin' on and from what had happened. You know.

LS: Yeah.

FF: And, now this guy is going to LUCAS' group and bad mouthing me and he don't know fuck all about what he's talking about.

LS: You mean MARGO, MAR, MARGOLIES?

FF: MARGOLIES.

LS: Yeah, yeah.

FF: He's...

LS: Bad mouthing you?

FF: . . . bad mouthing. No, SAM KATZ is bad mouthing me.

LS: Oh yeah.

FF: 'Cause he's a friend of MARGOLIES.

LS: Oh my God. SAM's got a big mouth.

FF: Yeah. So, anyway, that was the story.

LS: Heh, so now the license is in jeopardy if you're there.

FF: Well, I don't really know that. That's what FRANK says. He didn't come out and say.

LS: Well, what did BOBBY HOLMES say he's gonna do for ya?

FF: Well, I went and seen BOBBY HOLMES and, uh, he says, uh, "Fuck, don't pay any attention. I'II talk to 'em."

LS: Yeah.

F: "Why he's gettin' involved, uh, he's, uh, I talked to him, eh, eh, about six weeks ago when you came to me." And, uh, you know.

S: Let me ask ya. Doesn't BOBBY owe you?

F: Owe me what?

S: Don't he owe you favors? Come on. BOBBY HOLMES.

F: What the fuck does he owe me for?

S: Well, I don't know. I thought he was gonna be indicted, too. I heard through rumors.

F: Well.

S: Huh?

F: I have no idea. You know, that, that shit's all put in the newspapers just by conversation.

S: Yeah.

FF: I didn't know that. I, hey, I talked to fuckin' CLYDE and I, uh, talked to this one.

LS: Who's that, CLYDE PRITCHARD?

FF: PRITCHARD, yeah.

LS: Yeah.

FF: And, uh.

LS: Who uses him now?

FF: I don't even know.

LS: I see CLYDE once in a while. I run into him. But, uh, he was representing JOEY GIACCALONE, uh.

FF: Yeah,

LS: With that gun deal or he represents him, I think.

FF: Right.

LS: Yeah, CLYDE, he's somethin' else.

FF: So, that, well, you know, that's who I had. Right?

LS: Yeah.

FF: And, uh.

LS: Do you have CLYDE PRITCHARD?

FF: Not now.

LS: No?

FF: I had 'em on the last one.

LS: Who do you use?

FF: I'm using, uh, this HAROLD GUREWITZ.

LS: HAROLD GUREWITZ?

FF: Right.

LS: What law firm is he with?

FF: Oh, he's with, uh, GUREWITZ, uh, SMITH, uh, it's a big firm.

LS: Yeah?

FF: And, and he's, uh, he's a pretty talented, he was a, he was the chief prosecutor. You know the guy that died, or you know, GILMAN?

LS: Yeah.

FF: The guy, uh.

LS: He belonged to the club.

FF: Yeah, right,

LS: At one time.

FF: Well, he. . .

LS: I understand that, hey, hey, this was a real straight guy. A real nice gentleman, I understand.

FF: GILMAN?

LS: Yeah.

FF: Well, anyway, he took . . .

LS: Yep.

FF: . . . GUREWITZ' job.

LS: Oh, I see.

FF: GUREWITZ for nine years was the federal prosecutor.

LS: See, the whole trouble with those guys. I gotta tell you somethin', DICK, you know, it's been my

experience. These guys that work for the federal government, they come in there, ya know, they're not career people. You know, they come in there, they, uh, make a big showing and then they go to work for everybody out in the street. You know that they can do this and they can do that. You know that's bullshit.

Well, here, he, he represented, uh, VISTA. Some people in VISTA.

Oh, VISTA, yeah.

And, uh, you know, hey, FRANK, FRANK says that, uh, yeah, I talked to FRANK. He, he says he's real clever. He thinks and he represented FRANK, you know.

LS: Let me tell you somethin'. Let me tell you somethin'. I'm on the streets a long time. You know, and I stay away from everybody, you know, you know how I am. I, I stay away, do, I, I got my thing here and I do it and I'm happy. I go home and that's it. But I gotta tell you something. They got some career guys up there, uh, in that Attorney General's office. I forgot the name of this one little guy there.

FF: Well, the little guy . . .

LS: What's his name again?

FF: The little guy was COFFEE.

LS: COFFEE? No, there's another guy that tries these cases. Tried the VISTA case.

FF: I don't know about it.

LS:

FF:

LS:

FF:

LS:

You know, there's one guy there, he's been there about five, six, seven years I gotta tell you somethin'. For what I gather, he's probably one of the best trial lawyers. Did you hear me?

Mm hmm.

And he is highly respected by the lawyers profession like you have never seen. And he doesn't miss too much. You know what I'm talkin' about?

Mm hmm.

Everything looks rosy until the jury comes out, then they say what happened? (Laughs) You know what I'm talkin' about? What the heck's his name, that guy? I forgot it,

but he's, he's a pretty, pretty sharp guy. Uh, who is, who is the, uh, who tried your case?

FF: What'd ya...

LS: Last one.

FF: COFFEE.

LS: COFFEE? There's someone else, is he still there?

FF: No.

LS: There's another guy that took his place.

FF: The guy that took his place was, uh, oh, hell. What the fuck, he's a tall guy.

LS: I'm sure if he was tall, I would, uh. . .He's been there. Is he with the TASK FORCE?

FF: Yeah.

LS: Yeah, TASK FORCE. Highly respected talented man I understand. He,

he's pretty good. He gets those convictions.

FF: No, this is. Yeah, that's probably the same guy that's handling our deal.

LS: Your case now?

FF: Yeah.

LS: I don't understand. He's, he's, when you goin' to trial?

FF: Ah, it's slated for September now and, uh, you know, SOL SCHWARTZ has got FINK.

LS: NEIL FINK?

FF: And I understand that NEIL FINK is going in for another postponement 'cause he just got involved.

LS: Another postponement? He's gonna keep postponing as long as you can. But this guy here is a real sharp guy.

FF: Mm hmm.

LS: And, uh, FINK,he battles you down the line and, and, an he gets 'em. he gets those convictions, this guy. I know. I heard some lawyers talking about him saying he's fabulous.

FF: Mmm.

LS: But he's a career guy. But he don't give a goddamn. Look what you're going up against. You're going, you know, what happens if you lose here? Two-time loser.

FF: Right.

LS: What, what does that mean?

FF: Well, they, uh, according to what these attorneys are telling me and, and LENNY, let me tell you somethin'. This is the biggest bullshit fuckin' case.

LS: Well, what do they really got you for?

FF: Nothin'. They got me . . .

LS: Nothin'? They got you for somethin'.

FF: Hey.

LS: You got indicted.

FF: Wait a minute.

LS: Come on.

FF: They got me . . .

LS: Yeah.

FF: . . .right, for, okay, uh, when I went away in March of '80.

LS: Yeah.

FF: Uh, PROFESSIONAL SERVICES had signed a contract with the MICHIGAN CONFERENCE of TEAMSTERS HEALTH AND WELFARE FUND and what had happened is that ROGER TOWNE and ED BROWN

got more. That's who was, that's who PROFESSIONAL SERVICES was.

LS: Yeah, those guys had bad reputations.

FF: Okay. But not, but he, but listen to this.

LS: Yeah.

FF: So, I was a trustee.

LS: Mm hmm.

FF: They came to us in May of 1979, made a proposal to the trustees and we voted, the trustees, after taking all the other, voted the trustees, to give them the deal and they've had it ever since. Now, I resigned January the se-, officially, January the second. . .

LS: Yeah.

FF: . . . of 1980, I did not sit and do any business as far as the MICHIGAN

CONFERENCE from November until January when I resigned.

LS: Yeah.

FF: I made my, hey, I made my decision to plead guilty . . .

LS: Yeah.

FF: . . . in November and I, I went and I told BOBBY and I told my dad, I told ROY WILLIAMS, I told everybody.

LS: Mm hmm.

FF: Uh, I'm gonna resign. Okay? Because and for tax purposes and so forth.

LS: Yeah.

FF: They told me. Make it January, you know. They wanted me to resign prior to the first of the year. CLYDE talked to the government and got 'em to agree that I could

resign as because of the tax purposes.

LS: Yeah.

FF: And they says, okay. And I resigned. While I was away and while I was serving time, ROGER TOWNE, all right, put my wife to work . . .

(Tape Cuts out)

(End of Side #1 of 2)

(Beginning of Side #2 of 2)

FF: . . . in 1981.

LS: Yeah.

FF: Not in 80, but in 81, hired my wife, paid her eleven thousand dollars.

LS: Yeah.

FF: And what she was doing, she was, uh, looking at properties. You

know, 'cause they were building clinics.

LS: Clinics, yeah.

FF: And so forth. Now the whole goddamn thing, that's one count.

LS: Yeah.

FF: Because they paid my wife eleven thousand dollars.

LS: They claimed it was for you. Is that it?

F: They, they claimed that it was for, uh, receiving, uh, the, the legal words.

S: Yeah.

F: Something, you know.

S: Something that was illegal?

F: Even, eh, even when she got this money.

S: Yeah.

F: I wasn't working for the union.

LS: Yeah.

FF: And it was all shit 'cause when I come home, when I come home in December of 81, nothin' happened. I went to ROGER TOWNE in May because we, we had set it up, that "you know what, when you get out, you know, sit down and, and let's talk because you know, with your connections, through your father and so forth, hey, that's worth a million fuckin' dollars to us."

LS: That's right.

FF: "And we'll work. Okay?" When I come out, I went to EDDIE and I went to this guy ROGER and they says, "Okay, sure. Yeah, we'll put ya on, put it in writing." You know, writing?

LS: Yeah.

FF: Put you on twenty-five hundred dollars a month as consultant because of your, and, come right out and said it. Because of your connections with the labor organizations. Not necessarily the TEAMSTERS. The labor organizations, hey, it's, it's a, a, it's advantageous to us to put you on for twenty-five hundred. Then, about a day later after the letter, he called me and he says, it was already, our attorneys, at the advise of our attorneys, we've got to get permission from, from the government or somebody that you can work. It's not a violation of your, you know.

LS: Probation?

FF: No.

LS: Parole?

FF: Parole.

LS: Yeah.

FF: Even though I wasn't on parole, but you know I, I come under that RICO act, that five year shit.

LS: Oh.

FF: So, I says, uh, good. So, I went and I talked to, uh, my probation officer who, uh, you know, I wasn't on probation. I, uh, just went and talked to him, I'd seen.

LS: Yeah.

FF: And wanted to know if he'd give me a letter. He said, no. Went and talked to the labor department. I asked 'em if they'd give me a letter.

LS: Yeah.

And they didn't see anything wrong with it, but they wouldn't give me a letter. So, finally I called CLYDE and I says, hey CLYDE, to go to work I need a fuckin' letter from somebody. Okay, fuck it. He says, I'II just go right to COFFEE. Went to COFFEE and COFFEE said no.

So, he didn't have no connection with COFFEE. (Laughs)

Right.

(Laughs) See?

So, guess what?

What?

I never drew a dime from 'em.

Yeah.

Never got five fuckin' cents.

Yeah.

I never did a thing.

LS: Yeah.

FF: Now, that's one of the, hey, that's one of the fuckin' indictments.

LS: Yeah.

FF: The next one is at, okay, uh, TERRY PORTER, who also did some work with ROGER and . . .

LS: Yeah.

FF: . . . them. Whenever I was and I remember it so just like it was fuckin' last week.

LS: Yeah.

FF: TERRY and I have known each other for ten years.

LS: Yeah.

FF: I met him out at Bay Pointe when I was out there as a member and through golf and he'd come to the house with his wife, you know, just, just, uh, uh, acquaintance.

We had dinner and, and everything. But he got involved. He has one of these H. M. O.'s, you know, where nurses go out and . . .

Yeah.

. . . do all that shit. So, okay, in, in, uh, March, I, I, I turned myself in on March the eighteenth. March the twelfth. I was down, I was down at NEMO's and he come up to me. He says, "Well, DICK, you know, this and that, ba-ba-ba, and, you know somethin'", he says, "uh, uh, uh, I wanta do somethin' to help ya and, you know, I'm told, uh, I'm told I'm only got ten months (unintelligible). So, I says, so he says, "Hey, listen. You know what I'll do? Hey, why don't I do this? I'II give JEAN

four hundred a month. I'II go back to the office and I'II get some I. O. U.'s typed up."

LS: Yeah.

FF: "And sign 'em and I'II give her four hundred a month and then when you get out we'll get together, get somethin' goin' and we can . . ."

LS: Yeah.

FF: . . . work it off." Right? Okay. I sign 'em, I. O. U. It, it says I.O.U. four hundred dollars and, uh, you know.

LS: Yeah.

FF: An I. O. U. (clears throat). Okay, her first check was in March.

LS: Yeah.

FF: That he gave her. He gave her four hundred bucks. He went on to give her, uh, I'd sag fourteen checks

because, and then, even when I was in the shit can, he wrote me and I got the letters to prove it, he, the business has been kinda slow, DICK, uh, you know. I, we thought, we thought you was only gonna be gone ten months and here it is fourteen months and . . .

LS: So, what's four more months, right?

FF: Okay.

LS: Eh heh heh.

FF: So, anyway, but even when I was gone, I signed nine of 'em . . .

LS: Yeah.

FF: . . . before I left and my wife signed seven of 'em.

LS: Uh huh.

FF: NOW, LENNY, I've got proof, I got in his handwriting, you know, when

I first come home and, okay, the realization Senior's dead and gone.

LS: Yeah.

FF: Da-da-da, all that shit is all . . .

LS: When your dad died, you died, right?

FF: . . . all part of . . .

LS: Yeah.

FF: . . . shit, right?

LS: Right.

FF: So, anyway, I didn't go to work, I didn't go to work until 80, 83. Is it 83 or 82? 83. I went to work, uh, uh, for SHORTWAY.

LS: Yeah.

FF: You know, I was working down at COBO HALL . . .

LS: Yeah, right.

FF: . . . in between and so forth. And he, and TERRY, he's writin' me these fuckin' notes. You know, you still owe me six thousand dollars. I, I wish you'd pay me and I wish you'd do somethin' and so forth. And I got the notes.

LS: Yeah.

FF: But, you know, I loaned ya the money in good faith and, uh...

LS: You're kidding?

FF: . . . you owe me the money and la-la-la.

LS: Heh.

FF: Then . . . I work out a deal with him. Last year we went down to Florida, at my place in Florida and he says, okay, you know, just, then we started talkin'.

LS: Where you at in Florida?

FF: Tampa.

LS: Oh, Tampa. That's a good area.

FF: Yeah. So, anyway, we, I, we were down there. I took, uh, uh, six days last year and I went down to Florida. And TERRY, eh, TERRY, uh, uh, uh, his family lives right by there so he, he come down and he went with them for two days and he come over and stayed with me for four days.

LS: Hmm.

FF: And we golfed and, you know.

LS: Yeah.

FF: Just fucked around.

LS: Right.

FF: So, he says, hey, that was really nice and so forth. Hey, take five hundred dollars off, uh, of what you owe me and bla-bla-bla. You

know, next year my kids are gonna be gonna be gone and I'm gettin' me, I'm gettin' a divorce, you know.

LS: Yeah.

FF: And my kids, you know. I'II be down there wantin' to stay at your place a week, ten days with the kids.

LS: And take the money off.

FF: Take, and take it off and we'll just work it out that way. I says, all right, hey, fine with me.

LS: Right.

FF: That's another one of the counts.

LS: DICK, can I ask you a question?

FF: Yeah.

LS: You really, you know, you got problems. You got problems. You

go away again, then what are you gonna do?

FF: I have no idea.

LS: I'm gonna tell ya, you, you're a sunk goose with these guys. You look like the fall guy the way you're talkin'.

FF: Yeah, but what the fuck, hey, why am I the fall guy?

LS: I don't know. I don't know. You see, if your father was . . .

FF: You see.

LS: . . . alive, you wouldn't have that problem, right?

FF: You see.

LS: What's DON doing?

FF: He works for the INTERNATIONAL.

LS: For the INTERNATIONAL?

FF: Yeah, he's an auditor.

LS: And they won't let you do nothin'?

91-55

Supreme Court, U.S.
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No. 87-1284/2038; 87-1286/2072

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

FRANCIS R. FITZSIMMONS and

ROGER TOWNE (Petitioners)

-vs-

UNITED STATES OF AMERICA (Respondent)

APPENDIX

VOLUME IV

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Telephone Conversation of 5/1/85

(9 a.m., Continued from Volume III) . . .201

FF: No. You see, LENNY, these cocksuckers are, are, f-, are, are, they went after ED BROWN who was the principal.

LS: Yeah. Is he dead?

FF: Dead.

LS: Huh?

FF: Dead.

LS: That's what I heard, he died.

FF: Died of cancer. ALLEN DORFMAN was another one hooked into this case.

LS: Yeah.

FF: Dead.

LS: Dead. What the hell happened to him? (Laughs) I think, I think his friend walked him into the trap, Mister, what is it' FREIDMAN or somethin'?

FF: Yeah.

LS: Huh? Musta took him to lunch. When they take ya to lunch, you're in bad shape (unintelligible).

FF: Right.

LS: Huh? Right or wrong?

FF: That's right.

LS: Huh? I, I wouldn't go to lunch with nobody. (Laughs)

FF: So, anyway, uh, and I, I, I asked HAROLD 'cause he's researched these cases. Now, he's had this case since January.

LS: Yeah.

FF: He says he can't believe it.

LS: You know what? I gotta tell you somethin'. Believe it or not, it's the bottom line, what's gonna happen. The bottom line is that leave me tell you something. You go through one crisis, you have so

many friends. You go through another crisis and you lose the first crisis friends, then you come down to the bottom of the barrel, right? And then when you come out of the can again, DICK who? There ain't no more benefits, right? Nobody there. They, they get tired of this shit.

FF: Hmm.

LS: Everybody gets tired of it and, you know, hey, what else the guy doin'? It's adamant, you know. Who, who can advise somebody what to do? Uh, it comes a time when you, when you say to yourself, hey, fuck you guys.

FF: Well, there. Hey, he's made, he's filed motions. He filed motions last week. He filed five motions,

six motions. And, and these, he, he tells me that under the statute . . .

LS: Yeah.

FF: The statute of limitations has run out on 'em, on the two cases. Right?

LS: How?

FF: On the five years.

LS: Oh, I see.

FF: Right. And you're, eh, eh, in the day we're really think and wanta go to court. You see, let me tell you something, whenever Senior died, or, let's, let's go back a little bit.

LS: Yeah.

FF: Back in June, July or August of 1979, I, I was under indictment. ROGER TOWNE and ED BROWN came and

was with BOBBY, BOBBY and I as trustees, we took them up north as far as the Seminar. We liked their pro', I liked their program.

S: Uh huh.

F: It was this, uh, cap', uh, caputated program. And every insurance company in, in business today is doing it.

S: Yeah.

F: It was a hell of a program. They just were fuck-offs. They, you know, they were taking all their fucking money.

S: You know how I heard of 'em. You know I heard of 'em, uh, through, uh, TED DAMES.

F: Yeah.

S: You know. He's at, he's, you know, he's in that, uh, with the clinics

20:

and an industrial clinic, and what happened was. He told me about these guys, but nobody had a chance to bring their programs in except those guys into the TEAMSTERS.

FF: No, not true.

LS: It's not true? Well.

FF: Hey, not true back in 79. Now, what happened whenever they went from the HEALTH AND WELFARE, you know, and all this other, aye, uh, outpatient stuff.

LS: Yeah.

FF: That started happening in 1980 and 81. Fuck, I was in the shit house.

LS: Yeah.

FF: You know.

LS: Yeah.

The only thing that I brought 'em in and we brought 'em, the trustees . . .

Yeah.

. . . brought 'em in on was the goddamn dental program which saved us for Christ's sake, the first year three million dollars.

Yeah.

It's no hocus-pocus . . .

(Unintelligible)

. . . uh, deal. You know.

I, you know, I have some clients, too, right now that they, they, the goddamn HEALTH AND WELFARE is so high, we're, we're looking for H. M. O.'s. We're looking to go another way and I'm scared to go with anybody. I'm, I'm, I'm looking at programs right now, but,

uh, you know. I had this gal come in that was with this TOWNE or someone. This gal came in there and presented a program and then she, she mentioned their name. I told her I'm not interested. Hah, I told her to get out.

FF: Mm hmm.

LS: You know, I don't do no business with anybody like that. I, I wouldn't recommend it to my client at all. You know what I mean? Or to the, uh, the industry, uh, as a whole because, hey, I, I mean they're tarnished like you ain't never seen.

FF: Mm hmm.

LS: No. Pro-.

FF: Well, I . . .

LS: (Unintelligible)

FF: I, I agree and, and . . .

LS: And these guys are flying in with planes?

FF: But, d-d-d.

LS: But they came in and let me tell you something. They came in from what I gather, that I heard, recommended by DORFMAN. That's the way they came in originally, that outfit.

FF: Mm hmm.

LS: Follow? This is the way I heard it. That DORFMAN is the one that okay'd 'em all over. You follow? That's the way I heard it and when I heard that, I, say hey, fuck it, I don't want no part of these people. I wouldn't take this program to anybody.

FF: Mm hmm.

LS: Because once you get involved there, you got a problem. I don't have to tell ya.

FF: Well, anyway.

LS: (Unintelligible). Yeah.

FF: The program, you, you can't flaunt the program. The program . . .

LS: Yeah.

FF: . . . is excellent.

LS: Yeah.

FF: NOW, the Administrators of the program may...

LS: Oh, fuck yeah.

FF: . . . be fuck offs. But the program is, hey, I'd go for it again.

LS: Yeah.

FF: Because it is definitely a savings. You know, we won't get into that.

LS: Yeah.

FF: But that's how it all happened. Now, whenever this program was talked about and they, and we in the MICHIGAN CONFERENCE had adopted it, right?

LS: Yeah.

FF: And the dental. I went out and I went to Florida and seen JOE MORGAN. Introduced them to JOE MORGAN.

LS: Yeah.

FF: Right? Paid my own fare, but I think, I think, and you know, that, that, that's a long time ago.

LS: Yeah.

FF: I think, you know, how you go out where, we're, we're going as a group here. I'II introduce you to JOE MORGAN. Explain your deal to him and away you go.

LS: You opened the door.

FF: I opened the door. Now, they may have paid for my fuckin' room, but I paid for the dinner, you know, and . . .

LS: Yeah.

FF: . . . but they, I paid my own air fare.

LS: Yeah.

FF: Right?

LS: Yeah.

FF: I went out to California, all right? Did the same thing. Went to Washington, did the same thing. You know.

LS: Yeah.

FF: I, I introduced him to JOE T.

LS: Hmm.

FF: Now they got, on three different occasions, I think they, they, I'd

like to say they didn't, but I wouldn't swear to it. I think they picked up my room.

LS: Yeah.

FF: Maybe bought me a dinner.

LS: Yeah.

FF: What, am I fuckin' indicted for that?

LS: I don't know. Boy, that's bad. That's bad. Isn't, isn't, uh, uh, CHUCKIE O'BRIEN workin' for MORGAN?

FF: Yeah.

LS: He's back with the TEAMSTERS.

FF: Right.

LS: How the hell did he get back?

FF: Well, five years.

LS: What do you mean, five years? He had a wait . . .

FF: My old man, my old man bought the fuckin' deal, just like GEORGE VALENTE.

LS: Yeah.

FF: My old man bought his fuckin' deal.

LS: Yeah.

FF: You know.

LS: Yeah. Let 'em come back.

FF: Let 'em come back. Yeah. CLYDE told me I could probably get the deal . . .

LS: Yeah.

FF: . . . and come back. You come with fifteen thousand dollars to go to fuckin' court and do this and do that and you could probably get the restriction lifted.

LS: Lifted for fifteen grand.

FF: Yeah.

LS: Eh, you believe that?

F: No.

S: I don't believe it. And what I . . .

F: But I do know that through Senior . . .

S: Yeah.

F: . . . I know JOE or GEORGE VITALE got his deal that way.

S: Got, got it lifted?

F: Right.

S: Hmm.

F: And I do know that CHUCKIE got it lifted.

S: Oh, he got, they, they owe CHUCKIE plenty, right?

F: Well.

S: You know.

F: He got it lifted.

S: Huh?

F: He got it lifted.

LS: Yeah, is CHUCKIE back in town?

FF: No.

LS: Where is CHUCKIE?

FF: In Florida, he's workin' for the SOUTHERN CONFERENCE.

LS: Yeah, someone told me he was in town here recently or is in town.

FF: He may of, he may of come to town, but, uh.

LS: Who's the, who's he got 't come into town for?

FF: I don't know.

LS: Huh? You know what's gonna happen here, got a tenth anniversary coming up with HOFFA dead. You know, I hope I don't get any more publicity. I had enough.

FF: Yeah.

LS: Did you ever hear of me of all people, huh, gettin' thrown into

that suit. Would you believe it? Huh? Isn't that somethin'?

F: Hmm.

S: Unbelievable, isn't it? I can't believe it. You know, when my name came out, I, I, I was stunned. I was sittin' with my wife watchin' television. And I understand, uh, uh, JIMMY'S son, he don't get too much work there no more either no more. He's on the outs, his son.

F: Well, hey, you know, that, that was the deal because he, that started even, uh, uh.

S: Way back.

F: Way back.

S: Yeah. I gotta tell you somethin'. You know, you hear all kind of rumors. Your father was involved

and I was involved and this one was involved.

FF: Well, you see what they're doing, LENNY, and, and here's where I say it's, it's a conspiracy. Is they will never let the fuckin' thing. Here they go, hey, like you say, ten fuckin' years this year.

LS: Yeah.

FF: Since HOFFA has been gone.

LS: Yeah.

FF: And headlines...

LS: Yeah.

FF: . . . just here, what four weeks ago, five weeks ago?

LS: Yeah, that guy, yeah.

FF: About this fuckin' shithead that said, eh, uh, uh, that, uh.

LS: In the can or somethin'. A Program, some program.

That he, it's a program about...

Yeah.

. . . he was . . .

AL is his name.

Yeah. Now, now what, what do they bring that up for?

I gotta tell you somethin'. I gotta tell you somethin'. I hope they find where he's at. (Laughs) That ends it.

I really, I, I wish the fuck they would find him.

'Cause I gotta tell you somethin'.

You know, you gotta figure. You know, you got TONY PRO is in the shit house.

Yeah.

. . . because of that.

Right.

FF: GIACCALONE's in the shit house because of that.

LS: That's right.

FF: Uh, I don't know who else, uh.

LS: Well, there's, there's quite a few people.

FF: But.

LS: TONY PRO ain't never gonna get out.

FF: No.

LS: Never. Never. And TONY's comin' out in January I hear. I don't know what's gonna happen to him when he gets out. I gotta tell you something. Look at (unintelligible) has grand jury evidence 'cause (unintelligible). My, my . . . I gotta tell you somethin'. It is devastating. It's like the plague. Do you know what the plague is? Huh?

Knowing people like this, socialize and do you realize what it does to you? Huh? Kills you forever. You don't have a ' chance. Just by association and being social in anything and you're gone. I mean you're through. And, uh, this is what happens. Uh, I, I gotta tell ya. I, I stay away. I stay as far away from 'em.

Well, hey, I don't participate with the fuckin' TEAMSTERS in nothing.

Good.

I don't even, and I don't even socialize with LARRY and with BOBBY, Jr.

Yeah.

None of 'em.

Well, whatcha call see, CHUCKIE, listen, CHUCKIE COLLINS started

living high on the hog, you know, big time even in the bars, the broads, uh, what did he, built a home I heard, or somethin', a big home. Where in the hell does that money come from, you know. You, you're lifting eyes. Your eyebrows are, you're, when you start living beyond your, your means, hey, you always got somebody that says, hey, what's this, right?

FF: Mmm hmm.

LS: It creates attention. So, where there's smoke, there's fire. And, uh, this is what the hell it was. And, uh, runnin' all over, and this BROWN was tellin' everybody in town that they had the connections with the TEAMSTERS. They told everybody. Hey, ain't nobody gonna

get nothin' there. Look at BOB COY how he came up. Look at him. Unbelievable. I knew BOB, uh, you know, when I negotiated contracts with him. Today, eh, he's the big, the big guy there all of a sudden. Huh?

FF: Mm hmm. Mm hmm.

LS: You know, he was a piece of shit. (Laughs) He was a piece of shit if there ever was one, right? Look at him. Does he, does he talk to you?

FF: Fuck no.

LS: Huh?

FF: Well, hey, I can't, when I say he don't talk, he don't talk to me 'cause I don't talk to him.

LS: Yeah.

FF: You know, I, hey, I just don't go around them guys anymore.

LS: But there's VITALE. He moved out of there, right?

FF: Right.

LS: Why did he move? Look what's happening.

FF: Well, he had, you know, he hooked into a fuckin' deal and, uh, his big argument was with, uh, HOLMES.

LS: With HOLMES, yeah. But because he says HOLMES fucked him out of the insurance deal.

FF: Right.

LS: Yeah, and BOBBY's got a halo, nobody like nobody's got, right? You know? He's got a halo over his head. So, what's gonna happen?

FF: I wish the fuck I knew.

LS: Huh?

FF: I know they're gonna, I know goddamn well they're going to

put in and, uh, uh, you know. They're gonna, uh, answer these motions I think on the fourteenth or somethin'.

LS: But you know the judge is gonna, what judge?

FF: FREEMAN.

LS: Judge FREEMAN? He had my libel case against, uh, uh, READER'S DIGEST. Heh, that's a tough little guy.

FF: Mm hmm.

LS: You know, he don't hear too good, but he hears what he wants to hear.

FF: Well.

LS: And you better believe it.

FF: Hey, uh, uh.

LS: He's sharp.

FF: Here's what I thought about him. He's a, he's a . . .

LS: Fine gentleman.

FF: . . . if you're right, if you're right, you're right. And if you're wrong . . .

LS: Oh yeah, no monkeying around with him, yeah.

FF: No, there's no . . .

LS: No bullshittin' with that judge.

FF: Right.

LS: You know, I saw at the trial, he, uh, he- he, I've gotta tell you somethin'. Very fine judge. He knows what he's doin'. He don't hear too good, but he hears what he wants. And whenever they made a motion, he went right to the books, right to the law books.

FF: Well, and that's, that's why GUREWITZ seems to think that well,

we'll get a fair deal from him because, ya know.

LS: He's, he's not gonna dismiss nothing. He's gonna let you go to a jury and let the jury do it if you're going to a jury 'cause I gotta tell you somethin. I, I've been around lawyers too long and I don't have to tell you how they operate. If they got it, understand? And they know they got' the law, they go right to a judge and they don't, uh, ask for juries. They go right to a judge 'cause the Judge is gonna rule that the law says and prescribes that, uh, hey, there's no merit. But when, but it isn't that way (unintelligible), they tell you they gotta file briefs,

and they go through the goddamn motions and you know what that is? It's a stall tactic, I've learned that. I, hey, I've had it with 'em. I've, I've paid too much money for lawyers. I've been screwed around so much that I'm sick of 'em. I, I'm sick of lookin' at these guys. I tell you somethin'. Look at what that guy did to me. Eh, you know, I got him disbarred for forty-five days was suspended. Took him to the, uh, Grievance, uh, Committee of the Bar Association. He didn't, he, he this guy didn't even file answer to the interrogatories of the OAKLAND PRESS and they made a motion before Judge O'BRIEN to dismiss with prejudice and the

judge granted 'em which threw my case out. And this guy tells me all the time, you know, we guaran', he guar', let me tell you somethin'. When I started to sue originally, I didn't go there to sue for money. AlI I wanta do is get all this bad publicity out of my hair and sue these papers because I was being done in by and for nothing. All I was worried about is my wife, my kids, my grandchildren. You know what I mean? That's all I was concerned. I didn't care about myself. I just didn't want this (unintelligible). Everywhere I went people looked at me like I had horns in my head. So, what happened is, you know, there's LEONARD SCHULTZ, there's LEONARD

SCHULTZ, you know, eh, eh, ya know, enough is enough. Hey, you can just take so much of it. And so what happened is I went up there and I told 'em look, I, how much do you charge an hour? All I want you to do is start suing these people, but I, I'm not doin' it for money, follow? But when he started getting any, he says, hey, wait, there's a lot of money here. I'll guarantee you're gonna win this and I guarantee you're gonna win this here. Hey, guy didn't do nothin'. All he did was screw me around. He forgot to answer this motion, that motion and this is the kind of lawyer I had. So, finally, they threw the case out. So, I was sayin' to my wife, I says, you know

what? This guy came to my house on a DETROIT NEWS case one day and told me, you know what, cried. He said you get me disbarred and you can sue me for malpractice. He tells me this on a Sunday. He came knocking on my door. He goes and I didn't know that he did it then, anything wrong. But he's tellin' me this so I says, NEIL, I didn't hire you to get you disbarred or, or get you, or sue you for malpractice. I hired you to get these people off my back, allright? That's all I was concerned about. I'm worryin' about my family and myself here. I says, (unintelligible) in my labor relation work and everything and I says, another thing is, you know,

your dad, a lot of us spent a lot of money to put him through college. I says, my son had sixteen hours, LOWELL had sixteen hours left to be a, a lawyer and all the publicity killed him at the DETROIT COLLEGE of LAW and all the guys there tell hey, what is this here, you know and he couldn't take it no more so he had to leave. And I says, I know what I went though and agonized because my son couldn't become an attorney and I says, you know, I can imagine if your, what your mother and father would agonize if I went ahead and did this here. If you tell me I can do this here. I said what are you gonna do in the future in the other cases? You know. Then he

started crying and telling me, he says, you know, he says, I'm so happy that you understand and I said, I don't understand nothin'. I told 'em that I didn't hire for you, for me to understand anything except that you're an attorney, do your job. I says, but I didn't hire to get rid of you that way or, or to hurt you that way. I hired you because someone said that you were an attorney that fought these causes and that you had a reputation for that and I said this is the reason. I said, I felt that, uh, you would understand my position. But anyhow, and who you talking to? The, the, the end result was, you know, my wife just made up our mind, hey, enough was

enough and when I do this, I, I FF:
went ahead and, uh, found, uh, I LS:
went up to this SCHWARTZ guy that FF:
handles the grievances and I told
'em the story and hey, he said the LS:
guy, the guy did wrong. That's it. FF:
He says, he says, and we wanta go
after these kinda guys 'cause these LS:
lawyers take your money and hey,
you're dead.

FF: Right. FF:

LS: Hey, they think nothin' fifteen, LS:
twenty thousand, lt's nothin'.

FF: Fuck, I said this, this thing's
costin' me thirty grand.

LS: Thirty grand, there you are. Now, FF:
you see. And then when you come up LS:
there, I need more money and I need FF:
more money. You know, ta, come on. LS:
Where does it come from? FF:

That's right.

Where does it come from?

Well, hey, I, I'm gonna have to sell my fuckin' place in Florida.

Yeah.

And, uh, probably if I'm shot, just sell my house.

Sell your place in Florida, sell your house. Then what? Whatta you do with your family?

That's right.

Whatta you do with your wife and kids? I don't know. Do you think if you pled guilty, it would help you better?

Fuck no.

Why?

That's what I did last time, LEN.

And it didn't give...

And it killed me.

LS: Oh, they didn't give you probation?

FF: No.

LS: Boy, you're in a bad spot. I'II tell ya that, DICK. I'd do a lot of thinkin' about this here. What do these guys mean to ya?

FF: What?

LS: The guys that you're in-involved with.

FF: LENNY, I don't know what the fuck their deal is. I don't know nothin' about SOL SCHWARTZ.

LS: Yeah. Who is he?

FF: I don't.

LS: Who is SOL SCHWARTZ?

FF: He was ALLEN DORFMAN's partner.

LS: Oh, oh, oh.

FF: I don't know what ED BROWN and, and ROGER TOWNE did.

LS: Yeah. Who's in trial with ya?

FF: All five of 'em.

LS: Yeah.

FF: You got fuckin', uh, TERRY PORTER.

LS: Yeah.

FF: Uh, hey, fuck 'em. Hey, if I knew.

LS: Yeah.

FF: If I truthfully knew.

LS: Yeah.

FF: I'd tell 'em, but I don't know what the fuck they're talkin'. They're talkin' about skimmin' a million dollars, uh, uh; uh, a fuckin' month. Uh, uh, or somethin'.

LS: Hey, between you and me, you don't, you don't think they did it' do ya? (Laughs)

FF: Well, I don't know what they did.

LS: I know, I'm saying between you and me. You know. Come on.

FF: I don't know what that (unintelligible).

LS: Somethin' went off there, well, you know, here's a guy, uh, who stood, come on, his father and him were, uh, close to JIMMY HOFFA like you ain't never seen the DORFMAN'S. Come on.

FF: Right.

LS: They were close to your dad.

FF: Right.

LS: Right? Yeah, let's face it. They don't kill a guy unless there's somethin' wrong. Whatta you think, they just go out and kill people?

FF: I . . .

LS: There's gotta be a reason.

FF: I don't, hey, like I say, and that, that's really the bullshit in this case.

LS: (Coughs)

FF: Just like whenever PETE WILDEMIRE come out and says, hey, uh,' and, and, you know. I didn't say it to him. I, uh, uh, I forg', I don't know where the hell I said it, but I says no fuckin' way am I going back to jail.

LS: That's right.

FF: Right?

LS: Yeah.

FF: 'Cause I told PETE WILDEMIRE write that story about BOBBY HOLMES and everything. Truthfully, LENNY? I don't know if . . .

LS: Hey, you talked to PETE WALDME?

FF: WALDEMIER.

LS: PETE WALDEMIRE.

FF: Yeah.

LS: Yeah, you know the story there.

FF: Right.

LS: I know, I know MARTY when I talked to him, and MARTY says to me, he says, hey, if I was DICK, fuck them guys. That's what he says. Enough is enough.

FF: Yeah, but he, hey, Jesus Christ, if the government can, see, hey, I thought okay. The government's gonna come and they're gonna ask and, uh, try to make a deal, right? Like I told HAROLD, they can stick their deal up their fuckin' ass because I don't know. I don't know if ALLEN had a connection and with, uh, uh, ALLEN DORFMAN, or BOBBY HOLMES did.

LS: Yeah.

FF: I don't know if TERRY or ROGER, uh, uh, EDDIE BROWN had a connection

with ALLEN DORFMAN. What the fuck? I don't, I don't know 'cause I didn't participate.

LS: Tsk, tsk, tsk. Well, you're, you're in a bad position, honest to God you are. How you get yourself into those positions.

FF: You're in that fuckin' position just because I, I was, I was in a position.

LS: You see, leave me tell you somethin'. You know, when you look down on what's happened here, with the TEAMSTERS and, uh, you know, JIMMY HOFFA didn't get killed because of, uh, somebody just, uh, decided they're gonna kill 'em. There's reason, right? They kill ALLEN DORFMAN because there was no reason. There's a reason. He

either fucked somebody, right?
He fucked somebody.

FF: Mm hmm.

LS: Or he knew too much and they thought he was gonna be weak, right? But you know that from, what I hear, from people that ALLEN DORFMAN was not that way. He wasn't weak or anything.

FF: Mm hmm.

LS: But they, they sure led him down primrose lane, eh, eh. You know, dumped the guy. The same way with JIMMY. You know, JIMMY was rambunctious, uh, from what I gather, uh, he, he, he wouldn't let anything alone. He, he just gone wild. Boom, whatever happened happened, but like I say, uh, ain't nobody knows anything. That's the

problem. (Laughs) You see, and the government don't wanta hear that shit. You gotta know somethin', you know.

F: Yeah, well listen,

S: Hey, you know what I'm talkin' about?

F: I don't know.

S: Did you hear me? You gotta know somethin'. You see, the government don't wanta know that shit, but you know, you wanta know somethin', that's the way they are and that's the way they are. They don't wanta hear that bullshit. Don't know nothin'. Gotta know somethin'. These cocksuckers, I'II tell ya somethin'. They get you right in the middle and you have no way to get out. Isn't that amazing, huh?

FF: Mm hmm.

LS: Whatta you do afterwards?

FF: That's it.

LS: That's it.

FF: Well, fuck, hey, hey, hey, I'm goin' through that right now.

LS: What's that?

FF: Yah, whatta you do afterwards?

LS: Whatta you do? Yeah.

FF: That's the, that's the thing and just like I told ya.

LS: Now, if you go away, how much time can you get?

FF: How do I know?

LS: Well, you're a two-time loser if you get found guilty, you know. Hmph. Does this come under that racketeering act?

FF: Sure.

: Oh, shit. You can get twenty-five years on that if I'm, if I'm correct. Sure, you can get twenty-five seasons.

: Yeah.

: Oh, that's your whole life, DICK.

: Right.

: (Sighs). How about your wife and kid?

: Ah well, you know, shit, uh.

: What?

: She's hurtin'.

: Hurt, come on.

: Christ, the kids are all all right. They're all married. MARY, all . . .

: Yeah, but everybody, everybody, uh, uh, is, is, gosh, that's bad news.

: Yeah.

LS: I didn't know, DICK. I didn't know you came under that act.

FF: Yeah.

LS: Well.

FF: They're filing it under it. RICO.

LS: Yeah. And they'll make it stick to them guys. I'II tell you somethin'. What the heck's that guy's name? I'm tryin' to think of that man's name down there.

FF: Oh, JOHN, uh, NEWCOMER.

LS: NEWCOMER is it or someone else?

FF: No.

LS: No, I don't think that's the name.

FF: No. JOHN NEWCOMER's the one that's handling ours.

LS: Yeah. Real capable guy, that one, but there, well, he's a capable guy I hear. But they're career guys,

boy, they don't take no shit about nothin', you know.

F: Mm hmm.

S: They don't deal or wheel with nobody. Have they asked you ta, did they come to you?

F: No.

S: No? Maybe they're waitin' for you to come to them. (Laughs) Shit.

F: You know, you go or you figure hey, just like I told

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S: Yeah. It's gonna keep continuing.

F: Right.

S: I wish, you know what, you know the old story is, the old story, the, the end is, the, the end is like a lot of these guys, you know, you gotta come ta them. You gotta help 'em. They'll help you if you'll

help them. That's what the, you wanta know somethin'? I gotta tell you somethin'. This is no bullshit. Years ago, there's an old timer FBI Agent named JOE IZER (phonetic). Real classy guy if you ever saw one. And, you know, he, uh, he had, he pinched me a couple of times. Ah, this, this, this was in the forties and he said to me one time, you know those days you paid the cops off, you know, DETROIT POLICE DEPARTMENT. I don't have to tell you about the DETROIT POLICE DEPARTMENT in those days. Everybody went, you know, you, you, you, you, you know, for a hundred bucks, five hundred bucks, you could do anything in those days. And they're all thieves and they

use ta, they use to nail you and, and, and grab you. I use to come home to my mother when I lived, before I was married. They'd sit on the porch and grab me, you know, hey, LENNY, cost ya five hundred dollars ta, you know, go spend on seventy-two hours. They give you what they called the loop from one station to the other so the lawyer couldn't find ya. And I went through that quite a bit at that time and what happened is, he said to me, you know, every man has his price. I have yet to find a man that can match my price. Understand? So, you know, he had, he had no price (laughs). Right? All right, this is an honest guy, but he, you know what he told me?

you know, it's amazing. He says, you think you're a solid guy and all that bullshit. You know you're tough and all that crap. He says let me tell you somethin'. Your hair would stand up the people that you think are solid that come through this door of ours. Put the finger on everybody.

FF: No, fuck. The guy's . . .

LS: They guys that you associate with and you, heh, did you hear? Everybody's out for their, his, their own ass. Did you hear? Did you hear me? I wanta tell you somethin' and you get goddamn tired of gettin' knocked off every time. You know, it comes, it comes to a point where the legit route is the best route. You know what I mean?

You don't have no problems. Eh, I haven't had any problems in twenty-five years except, uh, bad publicity that, that I got here being a, a social friend of TONY's when, when he joined the club and all the bullshit. Understand? And you're suppose to know better. They tell ya, you're suppose to know better, DICK.

FF: Yeah.

LS: You see? But you don't know better because these guys don't work. Understand? They got all the time in the world to belong to all the clubs. They live like kings and when they go to jail, nobody suffers financially, the family. Because they got so much fuckin' money, right?

FF: Yeah.

LS: They, they can withstand anything. They have it coming in all the time, see? They're, they're well prepared, but a guy like you and a guy like me, understand, nobody, like me, you know, I'm not a poor guy, but, but also I could never stand the gap. You know what I'm talking? Them, them guys got millions. I mean, they don't make it. It keeps coming in. Hey, and they use everybody. They use me, they'll use you, they'll use anybody.

FF: Mm hmm.

LS: Yeah, how many times when you worked for the TEAMSTERS did they come up to ya, hey, I need a favor? Right? And you did it, right?

FF: Mm hmm.

LS: You do favors for people.

FF: I, I've always done favors for that guy.

LS: Yeah, and what did you get for it?

FF: Nothin'.

LS: Shit. You see what I'm talkin' about? So, you made a few bucks here and there. Big goddamn deal. You know what I mean? So, what good is that money? In the total end, you're laying in the shit house and you and being used. Follow? Look, look how, if anybody should be on top of the heap, it should be you because your dad was a top guy. You know what I'm talkin' about? Top guy.

FF: Mm hmm.

LS: Right or wrong? And look, who was he grooming, grooming you. You know you coulda had, look what happened to 299. Now, I gotta tell ya somethin', I gotta I've, I've got a client. They did not negotiate a contract for three goddamn years, understand? And they never came to the place, never ans-answered any grievances of the employees or anything. Follow? And they screwed up the, uh, the, uh, accountability of the, uh, pension fund. They were billing wrong. Follow? And what happened is, and I told, uh, uh, DON DETERS got into the situation and I told DON DETERS, you know, you guys should go to jail. It wasn't DON's fault, but the other guys never

came out there and my client was paying the HEALTH AND WELFARE. He was paying the pension and his, and, and, and doing the check off for the dues to protect the guys for losing their goddamn pension. Now where were they to negotiate a contract? Understand? We coulda kicked all these guys out, fired 'em and everything. They didn't belong to no union, but I told my client, no, just keep paying it because some of these guys who worked there fifteen, eighteen years, how about their pension? You know, they go down the drain. And now it, it's straight out not they have, uh, what's his name, uh, MIKE HUGHES from LUPILO's office,

FF: Mm hmm.

LS: Who, who's, uh, who does the pen, CENTRAL STATE's pension work here. Understand? We went through a whole hellaballoo here. You know, he filed, uh, uh, action in the federal courts and everything. But we finally got it straightened out and, you know, I wrote letters, uh, back and forth and I finally negotiated a contract with, uh, what's his name, uh, DON DETERS came out with another guy, what's his name, JOE SENELLI?

FF: Yeah, JOE, JOSEPH SANTANA.

LS: SANTANA. J-J-JOE who?

FF: SANTANA.

LS: SANTANA. Well, finally I told 'em. Hey, what are you running, a circus up there? See what I mean? You're not protecting your membership and

these guys, you know what? They wanta get rid of the union and go to another. I says, you get rid of this union. What, what about your pension? You know, you blow this here. You know the government don't screw around when it comes to pension funds. Man, you go to jail. You can't fuck around with this stuff. I mean they're strict.

F: Mm hmm.

S: So, what happens is I finally negotiated a contract there. Hey, let me tell you somethin'. And these guys here were union, strong union guys and they saw what happened here. And you know who they love? They love me 'cause I went in there and, and did a job to help 'em. I straightened the whole

thing up and, uh, I, and you know what? I told 'em right up front when we were negotiatin'. I said your fuckin' union didn't protect you at all. Yeah, I told 'em the way it was and that's the truth, it was that way. Now this, what's his name? I don't know this guy. JERRY, what was the other, what's his . . .

FF: CARTWOOD.

LS: Huh? What kinda guy is he?

FF: He's a cunt. He's a fuckin', uh, he's one of these, he's one of these, uh, uh, they, uh, we can do this, we can do that. You know, just, uh, a typical fuckin', uh, uh, protestor.

LS: Yeah, but I understand some of the places he had when he was a

business agent, uh, he takes care of them pretty good. They don't get, have no hardships down at EASTERN MARKET or somewhere?

'F: Naw.

LS: Huh?

'F: Shit, he's, he worked for EARL SMITH.

LS: Who is EARL SMITH?

'F: EARL C. SMITH. Fuckin' trucking company.

LS: Yeah, but I hear he, you know, he takes care of certain people, this guy, eh, asshole. I mean what's happening over there?

F: I don't know. I have no idea.

S: You know, I don't go down there. I, I, I didn't even wanta, I, I negotiated on a site of this client of mine. I don't even go down to

the TEAMSTER hall. I really don't. There's no one, you know, no one to say hello to even.

FF: No.

LS: Even BOB is that way. And WENDT (phonetic), he's, he's the head of the joint council now?

FF: Yeah.

LS: And he, he took BOBBY HOLMES' place, right? And BOBBY, if something happens to PRESSER, BOBBY HOLMES is gonna be the next, uh . . .

FF: Well . . .

LS: . . . President of the TEAMSTERS.

FF: That's, that's, uh, that's been thought about.

LS: Yeah. Who knows? But from what I gather, he's lucky. He's lucky he

didn't get, get nailed in this thing here.

F: Well, I don't know. You know, the, the, the whole goddamn thing.

S: How are you with him, pretty good? Good buddies?

F: I, I thought he was.

S: Huh? Well.

F: He said, er, uh, like I say. Like I told FRANK. Uh, uh, BOB has never done anything to hurt me, but then he's never done anything to help me, so I mean.

S: He never helps nobody.

F: You know.

S: He's got that reputation. Hey, he's got his clique and that's it.

F: That's it.

S: LARRY's come a long way.

F: Yeah. LARRY's doin' good.

Yeah. Yeah, he's done all right.

Mm hmm.

He's gonna head up, uh, that local, right?

I think, I think he'll . . .

They'll turn it over to him.

He'll be right there.

Huh?

He'll be there.

Yeah. He'll take that . . . You know what, I gotta tell ya somethin'. I'm gonna see, uh, FRANK, on Friday. I, I'm suppose to have lunch with him. And you know, he was feeling bad, really.

Well, yeah. Hey, hey, you know, I mean I've known FRANK for thirty-five years. You know?

Yeah.

And, uh.

LS: Well, you guys, you guys grew up together.

FF: Right.

LS: MARTY told me. I remember, you know, MARTY way back. You remember when you, you go to lunch together.

FF: Right.

LS: Sure.

FF: But, uh.

LS: You know, MAR, uh, MARTY's a great guy and he's doin' good.

FF: Right.

LS: Yeah, he's got a fine job and he's, hey, he, he's a hard working guy. And FRANK's a hard working guy.

FF: Right.

LS: And he's brilliant, though. But he's in there with all them guys politically. He's in with the union there, with the UAW guys.

FF: Yeah.

LS: And everybody.

FF: Mm hmm.

LS: He's in with, uh, COLEMAN YOUNG. He's in with LUCAS. He's in with all of 'em. He's somethin' else. He crawls in, huh? Well, you remember I was at the cocktail party I had, uh, remember over at the YACHT CLUB or so about that . . .

FF: Yeah.

LS: Where was that, the ATHLETIC CLUB, right?

FF: Yeah, DETROIT ATHLETIC CLUB.

LS: Yeah. I mean, I was wondering what the party was for. He says, well, it's my way of thankin' them people, uh, for what they did for me. He had every political guy

that was, uh, or union guy was there.

FF: Yeah.

LS: HOWARD SHEFFIELD (phonetic), all them guys. I mean he knows them all, don't he? Huh?

FF: Well, you know, through that clinics and, uh.

LS: Yeah, he's a mixer, yeah.

FF: Yeah.

LS: Well, he's made a lot of money in that clinic.

FF: Oh yeah.

LS: And he's doin' real well. I run into, you know, like once in a while I go down, uh, maybe once a month or somethin' to the CHOP HOUSE for lunch with someone, I always run into FRANK and, you know, eh, we always bullshit.

He's, he's, he's such a nice guy. MARTY, I talk to quite a bit, too.

FF: Mm hmm.

LS: Here and there. MARTY's a good guy, uh, you know, and he got in because of, uh, over there, because, uh, what help, he does what he do, labor relation work originally or some?

FF: Who?

LS: MARTY.

FF: No. Fuck, uh, hey . . .

LS: You know that truckin end.

FF: Hear they were looking for somebody and, uh, you know.

LS: And they got him.

FF: You know DICK KNAPP, uh, who is a real dear friend of the, of my dad's, and, uh, everything and MARTY . . .

LS: Got the job first.

FF: . . . was just a, a, you know, I, I represented this company and that company and so whenever they were asked, uh, what they thought about MARTY, hey, shit, yeah, he's a good guy.

LS: Really. He's, he's a good person.

FF: You know, he, he, he truthfully went in through DICK KNAPP.

LS: Yeah, that DICK KNAPP does a big job.

FF: Mm hmm.

LS: What is he with the company, the President or what?

FF: No, he used to be, uh, he used to be one of the owners of, uh, ANCHOR MOTOR FREIGHT when he was with ANCHOR MOTOR FREIGHT.

LS: Oh, oh. Now he's with LEASEWAY.

FF: Yeah. Well, LEASEWAY, they bought ANCHOR.

LS: Oh, LEASE, I didn't know LEASEWAY bought ANCHOR and...

FF: Yeah.

LS: . . . he, he kinda inherited it.

FF: Mm hmm.

LS: But he's a pretty big man there.

FF: Pretty big.

LS: Huh? I know they do a lot of warehousing for GENERAL MOTORS and everybody.

FF: Oh yeah. Shit, they, they, hey, uh, LEASEWAY is a, uh, is about a hundred and fifteen, hundred and sixteen companies.

LS: How long will they last with GENERAL MOTORS when their prices keeps going up every year, huh?

FF: They'll last forever.

LS: They, they bid it out. They bid those jobs out.

FF: No, they don't bid it. They, uh.

LS: What do they do?

FF: They, they, they take the logistics and, uh, the way that, uh, the way LEASEWAY's doing these programs, now they're going in on cost plus.

LS: Cost plus? Good. I hope I had a deal like that. Cost plus, boy could you make money, huh?

FF: Right.

LS: Cost plus what, a percentage?

FF: Sure.

LS: That's a, that's the greatest deal in the world. You can't lose.

FF: Right.

LS: Huh? Remember you use to have cost plus contr-, labor contracts no more.

91-35

Supreme Court, U.S.
FILED
JUL 5 1991
OFFICE OF THE CLERK

No. 87-1284/2038; 87-1286/2072

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

FRANCIS R. FITZSIMMONS and

ROGER TOWNE (Petitioners)

-vs-

UNITED STATES OF AMERICA (Respondent)

APPENDIX

VOLUME V

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F

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F

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F

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Right.

Hah hah. Huh?

Yep, but that's the, it's the only way that, I'II tell you what, the way GENERAL MOTORS feels about it, it's cheaper to do it that way than . . .

Oh yeah. Yeah.

. . . pay the employees.

Well, hire them through the U. A. W. again.

Yeah.

Well, I got, I gotta tell you somethin'. I don't know where it's all going, The unions are losing their membership and sooner or later they're gonna have to, uh, merge together because the only one that has any clout is the TEAMSTERS. They can stop things.

So, what you gotta do is build up another monster for the future because as the U.A.W. membership declines, the A.F.L.C.I.O. declines and the TEAMSTERS, you know, know what I mean?

(Knocking)

Better unlock the door, uh, decline.

(Sound of door opening)

They're, they're, they're gonna have to get together. It's, support themselves, these guys. 'Cause the money's going down. You follow? The service employees.

Mm hmm.

You know what I mean? All these, all these (unintelligible) unions, uh.

FF

LS

FF

LS

FF

LS

FF

LS

Oh, I think, I think in the next ten years you're gonna see such a difference in, uh, labor unions you can't believe it.

You think they're on their way out?

What?

No, I don't think they're on their way out.

Yeah, yeah, but they'll merge.

They have to, to one force, force and, and, and to be powerful.

They'll probably be more powerful.

No, I don't think.

No?

I don't think, eh, you'll ever see them get the power they have to . . .

No, I'm talking about together, if they merge, they would be a big power.

F: Well . . .

S: But.

F: You know, hey, LENNY.

S: They won't be big, but.

F: The power, the power is shit.

S: Yeah.

F: The power is gonna be a different kinda power.

S: Yeah.

F: And power is gonna be a political power.

S: Yeah.

F: Power's gonna be, uh, social power.

S: Yeah.

F: Uh, it's not gonna be a power to, uh, drive prices out of, outta sight and create inflationary situations.

S: But they did this all this time,

F: Right. They . . .

They, they screw themselves around.
But they, but they learned from that.
Yeah.
You know, you learn from that.
Well, how do you tell guys to go backwards that have mortgaged themselves up?
Well, you don't tell guys to go backwards. You be and you do it, you do it now in the front.
Yeah.
You tell 'em what, this is why and, and this is why you can't do it.
You know, I preached that for twenty somethin' years.
Oh, yeah.
Remember, I use to say, hey, you know what? You guys are building your own goddamn death warrant

here. What you're doing here is knocking the boss out of the box that writes you a paycheck. I use to scream that all the time. And what you're doin' is you're gonna put 'em out of business and you're gonna lose your job where you gonna go? Follow? So, the guy that starts going up the ladder, so he buys a boat, you know. He goes to SEARS AND ROEBUCK and signs. He goes here, he goes there. And he buys a better house and what happens is now he's got a bunch of payment books.

FF:

Well, that's, that's what you're . . .

LS:

Well, he says to me. Now he says I can't take a, a dollar an hour decrease.

FF:

LS:

FF:

LS:

FF:

Well, no, you can't. Hey, that's hard to do. But I mean you just throw it down in the front. You say it's just like the NATIONAL... Should have gone back years ago. . . . NATIONAL FREIGHT contract. Whatta you think the stock holders do? The stock holders of GENERAL MOTORS and FORD and everything. They don't wanta hear no bullshit. They tell 'em hey, if you can do it cheaper in Taiwan and Japan, go build factories there. That's where our investment goes.
Yeah, but that, that, uh, that there's gonna run outta gas, too.
Well, look at PRESSER with the Master Contract now.
Well, hey, that's what shoulda been done a long time ago.

LS: Well, where's he going? He's headin' for prison.

FF: That should of happened a long time ago.

LS: Yeah.

FF: He's a goddamn . . .

LS: He's an old thief from way back. That guy's a big thief. You know that.

FF: Yeah.

LS: You know, one of the big thieves. But, listen, was your ever close with him?

FF: Oh, fuck. BILL and my, BILL, BILL PRESSER and my dad were thick as thieves.

LS: No kidding? I can never figure him for LEONARD (unintelligible). (Laughs) Shit. Huh? There's a guy, huh? Huh?

FF: Haven't seen or heard from him.

LS: Yeah, I seen him. You think he'd come to ya and help you out.

FF: Fuck no.

LS: Look what your dad did for him, huh?

FF: Just like, oh, there's so many of 'em I've fucked.

LS: Go right down, right down on the list. I wanta tell you "somethin'. I hate to tell you this. But I'II tell you somethin'. God, I don't want you to think that I'm doin' this here to be a smart ass or nothin', but you're in such a fuckin' bad position I wouldn't even take a chance if I was you. You're gonna get yourself nailed for a while lot of time and you, and you're gonna sit in the fuckin'

can with these cocksuckers, huh? Are you? I mean maybe you don't know nothin' about this case, but you oughta talk to somebody where they can do yourself some good. Help out the elsewhere. That's what you do, make yourself a deal somewhere if you can. I'II tell you somethin'. It ain't like the other old days no more. I'm tellin' ya, everybody, I, you know what? I can't go near anybody no more. I mean you don't know who you're talkin' to.

FF: Mm hmm.

LS: And they're gonna do it to you. Understand? I'll tell ya, that's the way MARTY says, you know. I was talkin' to MARTY. MARTY says, you know what? How long is the guy

gonna take the bullshit? You know, he sits there and he, and ya keep throwin' him in jail and when you get done with this, they'll find somethin' else. It ain't gonna end, ever.

FF: Mm hmm.

LS: And, uh, you, you know. You, you just gotta go see somebody confidentially and, uh, say to 'em, hey, maybe I can't do nothin' here, but I sure can help you elsewhere. You know.

FF: Yeah, but you see LENNY, I'm not, I'm, I'm, I'm, uh, it, it's really difficult to say.

LS: Uh huh.

FF: But, you know, Senior and I just never really were what you'd call close, see?

LS: Yeah, I know that.

FF: He never, uh, confided in, a lot in, in . . .

LS: I know.

FF: . . . anything's said outside of that hall. The only things I truthfully knew, I knew the inner workings and the outer workings. . .

LS: Right.

FF: . . . of the union.

LS: Yeah. But you know what? I gotta tell you somethin'. You know, there was some, uh, talk on the street, ya know, certain people that, ah, that your dad didn't want JIMMY alive. You know what I mean? You know that, and, uh, there was rumors that he was involved because he was here in Detroit with a JIMMY

Q and that, that VITALE guy, PETE VITALE. He was seen with him at a restaurant. Follow?

FF: Uh huh.

LS: And, uh, hey, those are two bad guys. Do I have to tell you about them? You know. They didn't, those guys wouldn't give you the sweat off their balls, DICK. Did you hear me? Those two guys would shit on you, but use you. Did you hear me? I did some labor relation for, work for MIDWEST PAPER that, uh, what's his name was doing, uh, PHIL LANGER (phonetic)? I didn't know it. So, they had some problem and, uh, my son's, uh, uh, father-in-law was a social friend of the president of the company and when he had this problem, so my

son's father-in-law says, uh, why don't you talk to, uh, LEONARD and let him handle some of it. And he, the guy comes up while I was, don't tell me that he's got PHIL LANGER doing anything. And whatta you think these two guys tell me, huh? They call me down to a meeting with TONY. Of all times, understand, of all goddamn times, during the HOFFA thing. And I go down there. They wanta talk to me, they're gonna arbitrate this thing and I go down there and here's these two, this present owner of this here MIDWEST PAPER and a guy from Cleveland, from the Cleveland office and we got into a situation there and whatta you think JIMMY Q and, and PETE VITALE tell me? Whatever, how

much did you get for a fee? I says, uh, I got three thousand dollars. That was my fee for, for, for my services. And they said to me, well, you should give it to PHIL LANGER. I says, hey, wait awhile, just a second. I got a check for that. I pay income taxes. Did you hear me? And you're tellin' me I should give it back to him? I did the work. I didn't even know. He said, well, you should know bette. not to go there. Did you hear th.? These are nice guys, so I said to TONY, I said, these are your friends? I says, you brought me down here for this shit? Hey, I'II see ya, goodbye, fuck ya. You know what I mean? Don't tell me what to do.

And who to represent. And I got mad. But that's the kinda people you're dealin' with. The shit of the world. I'm tellin' ya. This is what it is. And look, look, look what, what they do. Look with MAXIE, you know. Hey, uh, TONY and MAXIE never got along. They were like that on me, jealousy, whatever, whatever was there. But, uh, me going down there once in a while, I use to go 'cause, yeah, I like MAXIE, you know, he's a good hearted soul and look how many guys got . . .

(Tape cuts off)

(End of conversation)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

ITED STATES OF
ERICA,

Plaintiff,

Crim. No.

ARLES F. COLLINS, 84-20715
ANCIS RICHARD
TZSIMMONS, Hon. Ralph
RRANCE L. PORTER, M. Freeman
L C. SCHWARTZ,
D ROGER TOWNE,

Defendants.

_____/

MEMORANDUM OPINION

On December 21, 1984, a federal
and jury returned an indictment charging
e above-named defendants with violations of
tle 18 of the United States Code. The
incipal charges are brought under the
cketeer Influenced and Corrupt

Organizations Act (RICO), 18 USC Sections 1961-68. Count I charges the defendants with a substantive RICO violation, under section 1962(c), and Count II charges the defendants with conspiracy to violate RICO, under section 1962(d). The remaining six counts of the indictment charge four defendants, individually, with violations of 18 USC Section 1954,[1] which in general prohibits the payment of kickbacks and bribes

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[1] In Count III, Defendant Towne is charged with violating Section 1954 and Defendant Porter is charged with aiding and abetting Defendant Towne. Count V charges Defendant Fitzsimmons with violating Section 1954, and Defendant Collins is charged with violations of Section 1954 in Counts IV, VI, VII, and VIII.

certain persons affiliated with the
inistration of union benefits funds.[2]
adly stated, the government claims
t certain entities which provide health
e related services and which were
egedly controlled by certain defendants,
eived favorable contracts with the
higan Conference of Teamsters Welfare Fund
lfare Fund) in exchange for gratuities and
er things of value given to other
endants who were associated with the
inistration of the Welfare Fund.

This matter is presently before the
rt on Defendants Fitzsimmons' and Towne's
ion to dismiss various counts of the
ictment on the ground that prosecution is
red by the five-year statute of
itations set forth in 18 USC Section 3282.
cifically, Defendant Fitzsimmons moves to
miss Counts I, II and V, and Defendant

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e text of Section 1954 is set out infra at
te 3.

owne moves to dismiss Counts I, II and III. he Court heard oral arguments with respect o these motions on November 18, 1985. On ecember 23, 1985, the Court denied both otions, ruling from the bench. This emorandum opinion sets forth the basis for hose rulings.

ounts III and V

The defendants' first argument ocuses on Counts III and V of the ndictment. In Counts III and V, Defendant owne and Defendant Fitzsimmons, espectively, are charged with violating 18 SC Section 1954.[3] Count V states in elevant part:

Section 1954 provides in part:

Whoever being --

(1) an administrator, officer, trustee, custodian, agent, or employee of any employee welfare benefit plan or employee pension benefit plan; or

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ntinued)

(2) an officer, counsel, agent, or
oyee of an employer or an employer any of
e employees are covered by such plan; or

(3) an officer, counsel, agent, or
oyee of an employee organization whose
ers are covered by such plan; or

(4) a person who, or an officer,
sel, agent, or employee of an
nization which provides benefit plan
ices to such plan receives or solicits
fee, kickback, commission, gift, loan,
y, or thing of value because of or with
nt to be influenced with respect to, any
is actions, decisions, or other duties
ting to any question or matter concerning
plan or any person who directly or
rectly gives or offers or promises to
or offer any fee, kickback, commission,
, loan, money, or thing of value
ibited by this section, shall be fined

[f]rom on or about April 23, 1979 to on or about January 2, 1980, both dates being approximate, . . . FRANCIS RICHARD FITZSIMMONS . . . unlawfully and knowingly agreed to receive and solicited money and things of value from Edward J. Brown, Roger Towne and Terrance L. Porter, to wit, United States currency and future employment and business associations with Terrance L. Porter, DPS and other companies managed and controlled by Edward J. Brown and Roger Towne, as a fee, kickback, commission, gift, loan, money and things of value, because of the actions, decisions and duties of FRANCIS RICHARD

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3 (continued)

not more than $10,000 or imprisoned not more than three years, or both [.]

FITZSIMMONS relating to questions and matters concerning the Welfare Fund . . . .

Similarly, Count III states in part:

> [f]rom on or about April 23, 1979 to on or about January 2, 1980, both dates being approximate, . . . ROGER TOWNE . . . unlawfully and knowingly offered, agreed and promised to give at a later time to Francis Richard Fitzsimmons, money and things of value, to wit, United States currency and future employment and business associations with . . . DPS and other companies managed and controlled by Edward J. Brown and ROGER TOWNE, as a fee, kickback, commission, gift, loan, money and thing of value, because of the actions, decisions and duties of Francis Richard Fitzsimmons,

relating to questions and matters concerning the Welfare Fund . . .

Both defendants contend that the indictment alleges an offense under section 1954, the prosecution of which is barred by the five-year statute of limitations set forth in 18 USC Section 3282.[4] Referring the Court to the phrase "[f]rom on or about April 23, 1979 to on or about January 2, 1980, both dates being approximate," the defendants argue that the indictment alleges violations of section 1954 as a continuing offense. The defendants further argue that such an allegation is improper in light of the Supreme Court's decision in **Toussie** v **United States**, 397 US 112 (1969). They urge the Court to construe section 1954 as describing

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[4] Section 3282 sets forth the statute of limitations generally applicable to federal criminal prosecutions:

three discrete acts which, if committed with the requisite intent, constitute an offense. If the statute were so construed, defendants contend that the indictment charges them with

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4 (continued)

> Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

There being no contrary provisions applicable to this case, both parties agree that section 3282 governs the instant prosecution.

committing a violation on April 23, 1979.[5] Because the indictment was not returned until December 21, 1984, the defendants conclude

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[5] The defendants argue that because the indictment alleges April 23, 1979 as the onset date of the violation, that date must be the date upon which the alleged violations of section 1954 occurred. The defendants, however, do not explain how this Court could make such a determination, prior to hearing the evidence, assuming the Court accepts their argument that a violation of section 1954 cannot be pled as a continuing offense.

that prosecution is barred by the statute of limitations.[6]

Initially, the government responded by arguing that resolution of the statute of limitations issue should be deferred until trial on the general issues. According to the government, the precise time at which the solicitation or agreement occurred is a question of fact to be resolved by the jury. This argument, of course, suggests that section 1954 describes discrete acts, as opposed to acts which are continuous in nature. In its supplemental response,

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[6] Alternatively, the defendants argue that Counts III and V are facially deficient because the allegations of time are insufficient to apprise Fitzsimmons and Towne of the charges against them. See **Russell** v **United States**, 369 US 749 (1961). The Court concludes that this argument is without merit.

however, the government made clear that Counts III and V charge Fitzsimmons and Towne with committing continuing offenses.

As a general rule, the statute of limitations begins to run when an offense is complete; that is, when every essential element of the offense has occurred. **Pendergast** v **United States**, 317 US at 115. The doctrine of continuing offenses is an exception to the general rule. See **Toussie**, 397 US at 115. Under the doctrine, the statute of limitations does not begin to run from the date of the commission of the initial act, even though all of the essential elements of the offense might be present. Instead, "in the case of a 'continuing offense' the crime is not exhausted for purposes of the statute of limitations as long as the proscribed course of conduct continues." Id. at 124 (White, J., dissenting) (citing **United States** v **Cores**, 356 US 405, 409 (1958); **United States** v **Kissy**, 218 US 601, 607 (1910); Model Penal

e Section 1.07, Comment Tent. Draft No. 5,
6), see generally 21 Am Jur 2d Criminal
Section 226 (1981).

Resolution of the statute of
itations issue with respect to Counts III
V depends upon the applicability of the
tinuing offense doctrine to the statutory
ense described in section 1954. In
ssie, the Supreme Court set forth the
nciples of statutory construction which
t guide this Court's decision in this
ard. Specifically, the Court stated:

> In deciding when the statute of limitations begins to run in a given case several considerations guide our decision. The purpose of the statute of limitations is to limit exposure to criminal prosecution to a certain fixed period of time following the occurrence of those acts the legislature has decided to punish by criminal sanctions. Such a limitation is

designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past. Such time limits may also have the salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity. For these reasons and others, we have stated before "the principle that criminal limitations statutes are 'to be liberally interpreted in favor of repose,' **United States** v **Scharton**, 285 US 518, 522 (1932)." **United States** v **Habig**, 390 US 222, 227 (1968). We have also said that "[s]tatutes of limitations normally begin to run when the crime is complete." **Pendergast** v **United**

States, 317 US 412, 418 (1943); see **United States** v **Irvine**, 98 US 450, 452 (1879). And Congress has declared a policy that the statute of limitations should not be extended "[e]xcept as otherwise expressly provided by law." 18 USC Section 3282. These principles indicate that the doctrine of continuing offenses should be applied in only limited circumstances since, as the Court of Appeals correctly observed in this case, "[t]he tension between the purpose of a statute of limitations and the continuing offense doctrine is apparent; the latter, for ail practical purposes, extends the statute beyond its stated terms." 410 F2d, at 1158. These considerations do not mean that a particular offense should never be construed as a

> continuing one. They do, however, require that such a result should not be reached unless the explicit language of the statute compels such a conclusion, or the nature of the crime involved is such that Congress must assuredly have intended that it be treated as a continuing one.

397 US at 114-15 (emphasis added).

In the instant case, the Court is persuaded a violation of section 1954 may be pled as a continuing offense because "the nature of the crime involved is such that Congress must assuredly have intended that it be treated as a continuing one." Id. at 115. The Court is of the opinion that section 1954 describes a course of conduct, beginning with a solicitation or offer and culminating in actual receipt of a bribe or kickback, which is inherently capable of continuing over an

ended period of time.[7] This conclusion is
ported by the legislative history of
tion 1954.

Section 1954 was added to Title 18
conjunction with the 1961 amendments to
Welfare and Pension Plans Disclosure
of 1958. See S. Rep. No. 908, 87th
g., 1st Sess. 2 (1961); H. R. Rep. So.
, 87th Cong., 1st Sess. (1961), reprinted
1962 U.S. Code Cong. & Ad. News 1532,
8-39. The overall purpose of these
ndments, including section 1954, was to
er and sanction identified abuses in the
inistration of employee welfare and
sion funds. S. Rep. No. 908 at 1-II. More
cifically, section 1954 was designed to
l with complex kickback schemes and

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e Court notes that no court has directly
ressed the issue presented by this aspect
the instant motion. Both the government
the defendants urge the Court to

7 (continued)

analogize two decisions construing 18 USC Section 201. Section 201 in general prohibits the payment of kickbacks, bribes, and other things of value to a public official for the purpose of influencing the official in the performance of his public duties. The Court has reviewed the authority cited by both parties and finds that these cases do not squarely confront the issue at hand. In **United States** v **Niederberger**, 580 F2d 63 (3d Cir 1978), the court indicated that a violation of section 201 may be continuing for purposes of determining proper venue. **Toussie**, however, clearly suggests that the fact that an offense is continuing for purposes of venue does not necessarily mean that the offense is continuing for purposes of applying the statute of limitations. See 397 US at 120-21 n. 16. In **United States** v **Hare**, 618 F2d 1085 (4th Cir

ontinued) 1980), the court held that
secution under section 201(g) was barred
re an indictment was returned in 1979
rging that the defendant had received a
n of $11,000 with favorable interest and
ayment provisions on May 29, 1970. The
rt, however, clearly indicated that its
ding was limited to the facts of that
e. 618 F2d at 1087. **Hare** is
tinguishable from the instant case on its
ts. In **Hare**, the defendant was charged
h receiving something of value in
lation of section 201(g). The act of
eiving is by its very nature an
tantaneous event. In contrast, the
endants in this case are charged with
eeing to receive and give things
value in the future, which suggests a
tinuing transaction or series of
nts.

particularly kickback schemes related to the procurement of insurance contracts through an employee welfare fund for the benefit of participating employees. Id. at 15. Examples of the type of schemes which section 1954 is intended to prohibit were described in the Senate Report:

> [o]ne complex example is the use of the straight bribe to obtain a loan from the fund. To achieve this result a cash payment is made prior to obtaining the loan to a third party ostensibly unrelated to the fund. The loan itself will then be made in an amount large enough to cover the previous payoff with high-risk real estate or otherwise questionable security as collateral. The bribe or kickback is consummated when the third party passes part or all of the bribe back to the trustee of the fund.

Where the fund is unable to lend the money immediately, a letter of credit can often be purchased to achieve similar ends. The letter of credit makes interim financing possible, and actual financing is usually secured from legitimate from legitimate sources after the high-risk hotel or restaurant, for example, is constructed. Sometimes the bribe takes the form of a part interest given to a third party in the business venture to be financed, or the loan will be obtained from a friendly bank in return for a time deposit by the fund. Each of these transactions, often involving millions of dollars, result in an improper exercise of the administrator's fiduciary responsibilities.

Id. These examples clearly buttress the court's conclusion that section 1954 was intended to proscribe a continuous pattern of activity as opposed to a single, instantaneous act.

Inasmuch as the indictment properly alleges violations of section 1954 as continuing offenses, the defendants' argument that prosecution for those offenses is time-barred is without merit. The indictment was returned on December 21, 1984 and alleges that the violations of section 1954 continued until January 2, 1980. Thus, the indictment on its face alleges an offense which occurred during the five-year period immediately preceding the return of the indictment. The Court, however, recognizes that the indictment in this case was returned within twelve days of the expiration of the statute of limitations. Accordingly, Defendants Fitzsimmons and Towne may assert a successful statute of limitations defense at trial if the government fails to prove that

the course of conduct continued into that twelve day period.

Count I

Defendants Fitzsimmons and Towne also move to dismiss Count I of the indictment. Their argument in favor of this motion is premised entirely on the assumption that the Court would dismiss Counts III and V as time-barred.[8] Inasmuch as the Court will deny the defendants' motion to dismiss Counts III and V, the Court need not address their arguments for dismissal of Count I.

Count II

Finally, both defendants move to dismiss Count II as it applies to them, again arguing that prosecution is time-barred. Count II charges Defendants Fitzsimmons and Towne, as well as their codefendants, with

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[8] Essentially, the defendants argue that if Counts III and V were dismissed, dismissal of Count I would also be required because

conspiracy to violate RICO, under 18 USC Section 1962(d). The defendants assert a two-prong argument in support of this aspect of their motion. First, they argue that the indictment fails to allege their participation in the conspiracy during the five-year period immediately preceding the return of the indictment. The defendants take the position that in order to prove participation in a RICO conspiracy, the government is required to allege and prove

---

8 (continued) the indictment would fail to allege the commission of at least one predicate act during the five-year period immediately preceding the return of the indictment. See **United States** v **Sinito**, 723 F2d 1250, 1260 (6th Cir.), cert. denied, ___ US ___, 105 S Ct 86 (1984); see also **United States** v **Field**, 432 F Supp 55, 59 (SDNY 1977), aff'd mem., 578 F2d 1371 (2d Cir) cert. denied, 439 US 801 (1978).

hat each defendant personally committed two redicate acts, at least one of which ccurred within a period not barred by the tatute of limitations. Alternatively, the efendants argue that even assuming the overnment is not required to prove the ersonal commission of two predicate acts, he indictment fails to allege any objective anifestation of their agreement to articipate in the conspiracy within the pplicable five-year period.

The Court concludes that these rguments are without merit. First, the efendants contention that the government s required to allege and prove that a efendant personally committed two predicate cts in order to prove his agreement to articipate in a RICO conspiracy has been

expressly rejected by the Sixth Circuit.[9] In **United States** v **Joseph**, No. 85-1144 (Jan. 16, 1986), the court held that reversal of the

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[9] The defendants rely on the Sixth Circuit Court's opinion in United States v Sinito, 723 F2d 1250 (1983), cert. denied, ___US ___, 105 S Ct 86 (1984) in which the court stated in relevant part:

> The government, in an attempt to prove a RICO violation under 18 USC Section 1962(c) must establish: (1) the existence of an enterprise which affects interstate or foreign commerce; (2) that the defendant "associated with" the enterprise; (3) that the defendant participated in the enterprise's affairs; and (4) that the participation was through a pattern of racketeering activity.

defendant's conviction under 18 USC Section 894 was required because the conviction was based on insufficient evidence. Slip op. at 9. The court then addressed the effect of that reversal on the defendant's RICO convictions:

> Our conclusion that Joseph's conviction on the 18 USC Section 894 count must be reversed, excludes one of the predicate acts relied on by the district court in convicting Joseph pursuant to 18

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continued) * * * In addition to proving the foremention elements, proof of a RICO conspiracy requires the existence of an agreement. An agreement can be shown if "the defendant . . . objectively manifested an agreement to participate directly or indirectly in the affairs of an enterprise through the commission of two or more predicate crimes."

USC Section 1962(c). Accordingly, Joseph's conviction pursuant to 18 USC Section 1962(c) must be reversed.

We reach a different conclusion with respect to the conspiracy count, 18 USC Section 1962(d). For a conspiracy conviction it is not necessary to prove that the defendant agreed to personally commit the requisite acts, but only that he agreed that another violate Section 1962(c) by

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9 (continued) 723 F2d at 1260, 1261 (citations and footnote omitted). While these statements might be interpreted as requiring proof that a defendant personally committed two predicate crimes, the court's opinion in **United States** v **Joseph**, **supra**, clearly rejects that interpretation.

committing two acts of racketeering activity. . . . Therefore, even though we find that one of the predicate acts relied on by the district court was insufficient, this does not foreclose a finding of guilt since Joseph may have agreed that others would commit the predicate acts.

lip op. at 10-11 (citations omitted).

The indictment in this case atisfies **Joseph**. It alleges that Defendants itzsimmons and Towne participated in a RICO onspiracy by agreeing to the commission of wo or more predicate acts. The indictment urther alleges that the conspiracy continued nto the applicable five-year period. ccordingly, the Court perceives no basis for olding that prosecution under Count II of he indictment is time-barred.

Nevertheless, the defendants ontend that the government is required to llege some "objective manifestation" of

their agreement to participate in the conspiracy which occurred during the period not barred by the statute of limitations. To the extent that the defendants equate an "objective manifestation" with an overt act, this argument is clearly without merit. The sixth circuit recently held that a RICO conspiracy conviction does not required proof of an overt act. **United States** v **Tripp**, No. 85-1031, slip. op. at 7 (Jan. 16, 1986). Because RICO conspiracy does not require proof of an overt act, "the indictment satisfies the requirements of the statute of limitations if the conspiracy is alleged to have continued into the limitations period." **United States** v **Coia**, 719 F2d 1120, 1124 (11th Cir 1983), cert. denied, ___ US ___, 104 S Ct 2349 (1984) (cited with approval in **United States** v **Tripp**, **supra**). As to a particular defendant, if the government proves that he was a member of the conspiracy, he is presumed to continue to be a conspirator until there is an affirmative

howing that he withdrew from the conspiracy. **nited States** v **Hamilton**, 689 F2d 1262, 1268 6th Cir 1982), cert. denied sub nom., **alisbury** v **United States**, 459 US 1117 (1983) quoting **United States** v **Mayes**, 512 F2d 637, 42 (6th Cir), cert. denied, 422 US 1008 1975)); see also **United States** v **Etheridge**, 24 F2d 951 (6th Cir. 1970), cert. denied, 400 S 993, reh'g denied, 401 US 926 (1971). hus, an indictment satisfies the statute of imitations with respect to a particular efendant if it alleges that he was a member f a conspiracy which continued into the imitations period. The defendant bears the urden of asserting his withdrawal prior to he limitations period as an affirmative efense.[10] **United States** v **Battista**, 646 F2d

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[10] In **United States** v **Read**, 658 F2d 1225 1981), the Seventh Circuit described the ffect of asserting withdrawal as an ffirmative defense:

237, 246 (6th Cir), cert. denied, 646 US 1046 (1981); **Blue** v **United States**, 138 F2d 351, 360 (6th Cir 1943), cert. denied, 322 US 736-37 (1944). In other words, the indictment need not contain negative allegations; that is, it need not allege that a particular defendant did not withdraw from the conspiracy prior to the limitations period.

For the reasons set forth above, Defendants Towne and Fitzsimmons' Motion to Dismiss the Indictment on the Ground that the

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10 (continued) Withdrawal marks a conspirator's disavowal or abandonment of the conspiratorial agreement. . . . By definition, after a defendant withdraws he is no longer a member of the conspiracy and later acts of the conspirators do not bind him. The defendant is still liable, however, for his previous agreement and for

ffenses Charged are Barred by the Statute of imitations is DENIED.

)

(continued) the previous acts of his coconspirators in pursuit of the conspiracy. . . . Withdrawal is not, therefore, a complete defense to the crime of conspiracy. Withdrawal becomes a complete defense only when coupled with the defense of the statute of limitations. A defendant's withdrawal from the conspiracy starts the running of the statute of limitations as to him. If the indictment is filed more than five years after a defendant withdraws, the statute of limitations bars prosecution for his actual participation in the conspiracy.

l. at 1232-33 (citations omitted).

RALPH M. FREEMAN

United States

District Judge

DATE: February 25, 1986.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v

CHARLES F. COLLINS,

FRANCIS RICHARD

FITZSIMMONS,

SOL C. SCHWARTZ, and

ROGER TOWNE,

Defendants.

/

Crim. No.

84-20715

Hon. Ralph

M. Freeman

MEMORANDUM OPINION

On September 19, 1986, the jury returned verdicts in this case, following a lengthy trial. Only Defendant Porter was wholly acquitted of the offenses charged. Defendant Schwartz was acquitted as to Count I but convicted of the offense charged in Count II. Similarly, Defendant Towne was

acquitted as to Count I and convicted as to Counts III and V. Finally, both Defendant Fitzsimmons and Defendant Collins were convicted of each of the offenses with which they were charged in the indictment.[1] This matter is presently before the Court on various post-trial motions brought by the defendants.

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[1] The charges in the indictment can be summarized as follows: Count I charged all of the defendants with violating the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 USC Section 1962(c). Count II charged all of the defendants with conspiring to violate section 1962(c) of RICO, in violation of 18 USC Section 1962(d). The remaining six counts charged various defendants with violations of 18 USC Section 1954.

MOTIONS FOR NEW TRIAL

All of the defendants move for a new trial, pursuant to Rule 33 of the Federal Rules of Criminal Procedure. The rule provides in relevant part: The court on motion of a defendant may grant a new trial to him if required in the interest of justice." A motion brought under Rule 33 is addressed to the trial court's sound discretion. See, e.g., **United States** v **Barlow**, 693 F2d 954, 966 (6th Cir 1982, cert. denied, 461 US 945 (1983). As a general principle, however, "[mlotions for a new trial are not favored and are granted only with great caution." **United States** v **Garner**, 529 F2d 962, 969 (6th Cir), cert. denied sub nom., **Brown** v **United States**, 426 US 922 (1976). Where the court is convinced that errors in the trial proceedings, either "singly or in combination, have resulted in a miscarriage of justice, a new trial should be granted. See **United States** v **Narciso**, 446 F Supp 252, 303-04 (ED Mich 1977) (Pratt, J.).

The Court will next consider each of the motions for a new trial, in light of these guiding principles.

COLLINS

Defendant Collins moves for a new trial on the ground that he was denied a fair trial as the result of prosecutorial misconduct. In the alternative, Defendant Collins urges the Court to conduct an evidentiary hearing to investigate the extent of prosecutorial misconduct during the trial of this case. In support of this motion, Defendant Collins identifies approximately seven categories of misconduct, in which he contends the prosecutor engaged.[2] He argues

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[2] Defendant Collins identifies the following acts of misconduct: manipulation of witnesses, interference with defense counsels' attempts to interview government witnesses; a continuing pattern of deceit and deception; creation of false and/or that

that taken as a whole, these alleged acts of misconduct are sufficient to warrant a new trial.

The Court has carefully reviewed the proceedings in this matter and is not persuaded that the prosecutor's conduct denied these defendants a fair trial. Moreover, the Court perceives no basis for conducting an evidentiary hearing in order to discover additional alleged acts of misconduct, not presently reflected in the record. Accordingly, Defendant Collins' motion for a new trial will be denied.

SCHWARTZ

Defendant Schwartz moves for a new trial on the ground that he was denied a fair

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[2] (continued) misleading interview memoranda; intentional eliciting of inadmissible testimony; misuse of summary exhibit 293; and abuse of trial subpoenas.

trial as the result of the Court's conditionally were later stricken from evidence. Specifically, the Court conditionally admitted Government Exhibits 251[3] and 252[4] under the Enright doctrine.[5] At the close of the prosecution's case-in-chief, the Court held that the Exhibits must be struck because the prosecutor had failed to establish a preponderance of the evidence

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[3] Exhibit 251 was a letter from Ed Brown to Allen Dorfman.

[4] Exhibit 252 was a letter which purported to be written by Roger Towne to Allen Dorfman. Marge Thomas testified that the letter was in fact written by Ed Brown for Roger Towne's signature.

[5] See **United States** v **Enright**, 579 F2d 980 (6th Cir 1978); see also **United States** v **Vinson**, 606 F2d 149 (6th Cir 1979), cert. denied, 644 US 1074 (1980).

that the statements were made in furtherance of the conspiracy charged. The Court also admitted, and later struck, certain testimony by Judith Burke relating[6] to Defendant Schwartz. Finally, the Court admitted certain testimony by Lesa Young, which related in part to Defendant Schwartz, and later held that the testimony[7] would be admissible only as to Defendant Collins. The Court offered to give an appropriate cautionary instruction in connection with its ruling but Defendant Schwartz declined the Court's offer.

Having carefully considered the arguments raised in support of this motion, the Court is not persuaded that Defendant Schwartz was denied a fair trial. In conditionally admitting and later striking

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[6] See Defendant Schwartz's Motion for a Mistrial, filed July 28, 1986, pp. 5-15.

[7] Id. at pp. 22-23.

the evidence of which Defendant Schwartz complains, the Court followed a procedure specifically approved by the Sixth Circuit in **United States** v **Vinson**, 606 F2d at 153. Moreover, in accordance with **Vinson**, the Court considered the prejudicial effect of this evidence when it ruled on Defendant Schwartz's motion for a mistrial, brought at the close of the government's case-in-chief. For the reasons then stated, the Court denies case Defendant Schwartz's motion for a new trial.

TOWNE

Defendant Towne moves for a new trial on two grounds. First, he argues that the admission of Charles Collins' and Genevieve Fitzsimmons' grand jury testimony violated his sixth amendment right to confront the witnesses against him. In a lengthy memorandum opinion filed on July 18, 1986, the Court rejected Towne's argument that the admission of this grand jury testimony violated his sixth amendment

rights. For the reasons stated in that opinion, the Court will deny Defendant Towne's motion for new trial insofar as he claims a violation of his sixth amendment rights.

Defendant Towne asserts a violation of his fifth amendment right to remain silent as the second ground for granting a new trial. Specifically, Towne argues that comments made by witnesses Linda Riffle and Marge Thomas, to the effect that the prosecutor should ask certain questions of Roger Towne, constituted an impermissible reference to his decision not to testify. The Court notes that Defendant Towne has cited no authority which supports his argument. Inasmuch as the Court is persuaded that the prosecutor did not solicit these comments, nor did he attempt to emphasize the arguable inappropriate response, the Court will deny Defendant Towne's motion for a new trial insofar as he claims a violation of his fifth amendment rights.

FITZSIMMONS

Defendant Fitzsimmons moves for a new trial on the ground that certain inadmissible evidence was presented to the jury and that the evidence was so prejudicial that a cautionary instruction could not protect his right to a fair trial. Specifically, Defendant Fitzsimmons refers the Court to the testimony of Judith Burke regarding a comment made to Ed Brown by Frank Fitzsimmons and Burke's testimony regarding Brown's monthly business visits to Genevieve Fitzsimmons. Defendant Fitzsimmons further argues that he was incurably prejudiced by comments made by the prosecutor during closing arguments, referring to Fitzsimmons as an "ex-con" and referring to Ms. Burke's testimony, described above, which had been stricken.

Having carefully considered the arguments raised by Defendant Fitzsimmons in support of this motion, the Court concludes that Defendant Fitzsimmons was not denied a

fair trial. Accordingly, his motion for a new trial will not be denied.

MOTIONS FOR JUDGMENT OF ACQUITTAL AND/OR ARREST OF JUDGMENT

Defendants Schwartz, Towne and Fitzsimmons move for a judgment of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure. Rule 29 provides, in relevant part:

> (c) Motions After Discharge of Jury. If the jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made or renewed within 7 days after the jury is discharged or within such further time as the court may fix during the 7-day period. If a verdict of guilty is returned the court may on such motion set aside the verdict and enter judgment of acquittal. If no

> verdict is returned the court may enter judgment of acquittal. It shall not be necessary to the making of such a motion that a similar motion has been made prior to the submission of the case to the jury.

Fed. R. Crim. P. 29(c).

A motion for judgment of acquittal, thus, tests the sufficiency of the government's evidence. In ruling on a motion brought under Rule 29, the trial court must consider the evidence in the light most favorable to the government. See, e.g., **Glasser** v **United States**, 315 US 60, 80 (1942); **United States** v **Adamo**, 742 F2d 927, 932 (6th Cir 1984), cert. denied, 105 S Ct 971 (1985). Moreover, the government is entitled to the benefit of all reasonable inferences which can be drawn from the evidence, even though the evidence may be circumstantial. See, e.g. **United States** v **Prieur**, 429 F2d 1237, 1238 (6th Cir 1970).

The test is whether based on the evidence taken as a whole and considered in the light most favorable to the government, together with all legitimate inferences to be drawn therefrom, a rational trier of fact could find the defendant guilty beyond a reasonable doubt of the offense or offenses charged. **Adamo**, 742 F2d at 932. In making its determination, the trial court cannot weigh the evidence nor judge the credibility of witnesses. **United States** v **Wolfenbarger**, 426 F2d 992, 994 (6th Cir 1970); **United States** v **Luxemberg**, 374 F2d 241, 248 (6th Cir 1967); see also **Burks** v **United States**, 437 US 1, 16 (1978).

Defendants Towne and Fitzsimmons also move, in the alternative, for arrest of judgment pursuant to Rule 34. The rule provides:

> Rule 34. Arrest of Judgment
> The Court on motion of a defendant shall arrest judgment if the indictment or information does not

> charge an offense or if the court was without jurisdiction of the offense charged. The motion in arrest of judgment shall be made within 7 days after verdict or finding of guilty, or after plea of guilty or nolo contendere, or within such further time as the court may fix during the 7-day period.

Fed. R. Crim. P. 34.

Unlike a motion for judgment of acquittal, a motion under Rule 34 tests the sufficiency of the indictment rather than the sufficiency of the evidence presented at trial. See generally, C. Wright, Federal: Practice and Procedure: Criminal 2d Section 571-72 (1982).

The Court will address the merits of each of the motions for judgment of acquittal and/or arrest of judgment, in light of these guiding principles.

SCHWARTZ

Defendant Schwartz moves for a judgment of acquittal on the ground that the government's evidence was insufficient to support a conviction. Defendant Schwartz was convicted of the offense charged in Count II, that is, conspiracy to violate RICO. The Court has carefully considered the evidence introduced against the evidence introduced against Defendant Schwartz and concludes that, when the evidence is considered in the light most favorable to the government, a rational juror could find him guilty beyond a reasonable doubt.[8] Accordingly, Defendant Schwartz's motion for judgment of acquittal is denied.

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[8] The Court will not attempt to summarize the evidence presented over the course of an eight month trial in order to support its decision on this motion.

FITZSIMMONS AND TOWNE

As already stated, both Defendant Fitzsimmons and Defendant Towne move for a judgment of acquittal or, on the alternative, arrest of judgment. Both defendants raise two arguments in support of their motions. First, they argue that their prosecution was barred by the five-year statute of limitations set forth in 18 USC Section 3282. Second, the defendants argue that 18 USC Section 1954, which in essence provided the basis for all of the charges in the indictment, is unconstitutional. For the reasons stated in connection with the Court's ruling on the defendants' motions for judgment of acquittal brought at the close of the government's case-in-chief, the Court rejects the argument that section 1954 is unconstitutional. Thus, the only issue is whether the Court should reconsider its ruling that the indictment properly charges offenses, the prosecution of which is not barred by the statute of limitations.

Defendants Fitzsimmons and Towne first raised the statute of limitations issue in a pretrial motion to dismiss the indictment. The basis of their motion to dismiss, as well as the present motion, can be best understood by focussing on the argument as it relates Defendant Fitzsimmons. Fitzsimmons first referred the Court to Count V of the indictment, which charged him with a violation of 18 USC Section 1954. Specifically, Count V alleged that the violation occurred "[f]rom on or about April 23, 1979 to on or about January 2, 1980, both dates being approximate." Fitzsimmons argued, and the government conceded that Count V alleged the violation of section 1954 as a continuing offense. Fitzsimmons further argued that under the Supreme Court's decision in **Toussie** v **United States**, 397 US 112 (1969), section 1954 must be interpreted as prohibiting a series of discreet acts as opposed to describing a continuing offense. Accordingly, he urged the Court to dismiss

Count V of the indictment. Defendant Towne raised the same argument with respect to Count III, which charged him with a corresponding violation of section 1954.

With respect to Count I, which charged a substantive RICO violation, Fitzsimmons argued that the indictment should be dismissed because it failed to allege any act of racketeering within the five-year period immediately preceding the return of the indictment. Under section 1962(c) of the RICO statute, the government is required to allege and prove that a defendant committed two acts of racketeering, at least one within the limitations period, in order to convict a defendant of a substantive RICO violation. See **United States** v **Sinito**, 723 F2d 1250, 1260 (6th Cir), cert. denied, 469 US 817 (1984). In the present case, the only act of racketeering alleged to have been committed by Defendant Fitzsimmons within the limitations period was the section 1954 violation alleged in Count V. Accordingly,

Fitzsimmons urged the Court to also dismiss Count I. Although Towne raised the same argument prior to trial, the issue is moot as it applies to him because he was acquitted of the offense charged in Count I.

Finally, Defendant Fitzsimmons moved to dismiss Count II, which charged him and his co-defendants with RICO conspiracy, in violation of 18 USC Section 1962(d). Essentially, Fitzsimmons argued that the indictment failed to allege an "objective manifestation" of his agreement to participate in the conspiracy during a period not barred by the statute of limitations. According, he urged the Court to dismiss Count II. Defendant Towne made substantially the same argument with respect to the conspiracy charge.

In a memorandum opinion filed on February 25, 1986, the Court denied the motions to dismiss. In essence Defendants Fitzsimmons and Towne urge the Court to reconsider that ruling, in connection with

the motions presently before the Court. Having carefully considered, and reconsidered, these arguments throughout the course of this trial, the Court is now persuaded that section 1954 proscribes discrete acts as opposed to acts capable of continuing over an extended period of time. Accordingly, the Court will grant the motions for arrest of judgment insofar as they relate to Counts I, III and V. Moreover, the Court vacates its decision of February 25, 1986, to the extent that it is inconsistent with this decision. With respect to Count II, however, the Court is still not persuaded that the prosecution of these defendants was time-barred. Accordingly, for the reasons set forth in the Court's February 25, 1986 Memorandum Opinion, the Court will deny the motions for having arrest of judgment as they relate to Count II. Moreover, having carefully reviewed the evidence, and considering it in the light most favorable to the government, the Court is persuaded that

there was sufficient evidence upon which to base Defendant Fitzsimmons' and Defendant Towne's conviction under Count II. Therefore, the motions for judgment of acquittal as to Count II will also be denied.

CONCLUSION

For the reasons set forth in this opinion, each defendants' motion for a new trial will be DENIED; each defendants' motion for a Judgment of acquittal will also be DENIED; Defendant Fitzsimmons' motion for arrest of judgment will be GRANTED with respect to Counts I and V and will be DENIED with respect to COUNT II; and, finally Defendant Towne's motion for arrest of judgment will be GRANTED with respect to Count III and will be DENIED with respect to Count II. The government shall submit an appropriate order.

Ralph M. Freeman

United States District Judge

DATED: January 13, 1987.

91-55

Supreme Court, U.S.
FILED
JUL 5 1991
OFFICE OF THE CLERK

No. 87-1284/2038; 87-1286/2072

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

FRANCIS R. FITZSIMMONS and

ROGER TOWNE (Petitioners)

-vs-

UNITED STATES OF AMERICA (Respondent)

APPENDIX

VOLUME VI

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

UNITED STATES
OF AMERICA,

Plaintiff, Crim. No.

v 84-20715

CHARLES F. COLLINS,
FRANCIS RICHARD FITZSIMMONS,
SOL C. SCHWARTZ, and
ROGER TOWNE,

Hon. Ralph M. Freeman

Defendants.

_____/

MEMORANDUM OPINION

On September 19, 1986, following one of the lengthiest trials in this jurisdiction, a jury returned verdicts in this hotly contested case.[1] Only defendant Porter

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[1] The trial commenced January 24, 1986 and concluded September 19, 1986.

was wholly acquitted of the offenses charged. The jury acquitted defendant Schwartz on Count I but convicted him on Count II. Similarly, the jury acquitted defendant Towne on Count I but convicted him on Counts II and III. The jury convicted both defendant Fitzsimmons and defendant Collins on each of the offenses with which the indictment charged them.[2] In an opinion dated

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[2] The indictment charges generally as follows: Count I charges all of the defendants with violating the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. Section 1962(c). Count II charges all of the defendants with conspiring to violate section 1962(c) of RICO, in violation of 18 U.S.C. Section 1962(d). The remaining six counts charge various defendants with violations of 18 U.S.C. Section 1954.

January 13, 1987, the court granted defendant Towne's motion for arrest of judgment on Count III and granted a similar motion by defendant Fitzsimmons on Counts I and V. All of the defendants appealed their convictions.

On October 30, 1985, prior to the start of the trial, the government filed an in limine motion for a protective order to seal evidence regarding defendant Fitzsimmons and made an in camera offer of proof. The evidence that the government desired sealed consists of transcripts of a tape-recorded conversation between defendant Fitzsimmons and Leonard Schultz, a high-level Federal Bureau of Investigation (FBI) informant for approximately 35 years. The conversation was recorded on May 1, 1985, after Fitzsimmons was indicted but before trial and while he was represented by counsel, Harold Gurewitz. On November 19, 1985, the court ordered that the transcript be sealed and issued a protective order. See Attachment A. The court found that the transcript did not

contain exculpatory information within the meaning of **Brady** v **Maryland**, 373 US 83 (1963). The court also ordered that if the government elected to use the transcript at trial, disclosure to the defense would be required. The government did not use the transcript at trial.

On August 17, 1987, after the defendants filed notices of appeal, the government gave defendant Fitzsimmons a transcript of the recorded statement of defendant Fitzsimmons that had been the subject of the protective order. The government had filed a motion to unseal, and the evidence was unsealed by court order on August 17, 1987. Fitzsimmons' counsel informed other defense counsel about the transcript.

On the basis of the unsealed transcript, the defendants[3] filed motions for new trials under F.R.Crim.P. 33 because of alleged fifth and sixth amendment violations or in the alternative for an evidentiary hearing. This court certified to the United States Court of Appeals for the Sixth Circuit that it would grant the motion for an evidentiary hearing, see **United States** v **Blanton**, 697 F2d 146 (6th Cir 1983) (per curiam), and that court remanded the case for this court to proceed. See Order, **United States** v **Collins**, No. 87-1283 (6th Cir Sept. 22, 1988).

Following remand, the court heard testimony over the course of four days and received into evidence several exhibits, some of which are the subject of another

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[3] Since defendant Porter was acquitted of the charges, he is not part of the present controversy.

protective order.[4] The parties have submitted

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[4] Prior to the start of the evidentiary hearing the government filed a "motion for in camera inspection and examination of certain documents and to seal said documents and brief in support thereof." The government had provided to defense counsel in redacted form certain exhibits for use at the hearing, but it wanted to prevent disclosure of certain documents to defense counsel because of the deliberative process privilege, the investigative techniques privilege, and the government informant privilege. See Motion, at 4. The court granted the motion and ordered those documents sealed. The court, however, has reviewed those documents in ruling on the defendants' motions. After a thorough review of this entire matter, the court finds that its original decision to grant the motion was sound, even though it was a hasty decision done at the insistence

proposed findings of fact and conclusions of law, as well as objections to the other side's proposals, and the matter is ripe for disposition. The court will deny the motions for new trials, and the following represents the court's findings of fact and conclusions of law.

I. BACKGROUND FACTS

A federal grand jury returned the forty-page indictment against the defendants on December 21, 1984. The indictment generally concerns the Michigan Conference of Teamsters Welfare Fund (Fund) and alleges that certain defendants gave or promised to give money or things of

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4 (continued) of counsel. Some of the sealed documents were provided to defense counsel after certain testimony came in concerning them. Therefore, the court will continue its order sealing those documents through the appellate process.

value to other defendants who were associated with the administration of the Fund in connection with the awarding of health care contracts by the Fund to certain companies that promoted and administered health care plans. Count I charges that the defendants violated RICO from April 23, 1979 through December 31, 1982. Count II charges that the defendants conspired to violate RICO from February 1, 1979 through December 21, 1984. The indictment also charges various defendants with violating 18 U.S.C. Section 1954 as follows:[5]

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[5] That statute provides in relevant part:

Whoever being--

(1) an administrator, officer, trustee, custodian, counsel, agent, or employee of any employee welfare benefit plan or employee pension benefit plan; or

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(continued)

(4) a person who, or an officer, counsel, agent, or employee of an organization which, provides benefit plan services to such plan receives or agrees to receive or solicits any fee, kickback, commission, gift, loan, money, or thing of value because of or with intent to be influenced with respect to any of his actions, decisions, or other duties relating to any question or matter concerning such plan and any person who directly or indirectly gives or offers, or promises to give or offer, any fee, kickback, commission, gift, loan, money, or thing of value prohibited by this section, shall (be guilty of violating this statute.] Provided, That this section shall not prohibit the payment to or acceptance by any person or bona fide salary, compensation, or other payments made for goods or facilities actually furnished or

Count	Date	Defendant(s)
3	4-23-79 to 1- 2-80	Towne & Porter
4	4-23-79 to 12-31-82	Collins
5	4-23-79 to 1- 2-80	Fitzsimmons
6	8-79 to 12-31-79	Collins
7	1-31-81 to 2- 7-81	Collins
8	8-23-81 to 8-26-81	Collins

On January 3, 1985, attorney Harold Gurewitz filed his appearance as counsel of record for defendant Fitzsimmons.

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5 (continued)

for services actually performed in the regular course of his duties as such person, administrator, officer, trustee, custodian, counsel, agent or employee of such plan, employer, employee organization, or organization providing benefit plan services to such plan.

On January 22, 1985, FBI agents in Detroit, Michigan received information that Leonard Schultz, a long-time FBI informant, had become involved, along with several other people, in narcotics trafficking between Florida and the Detroit area. Schultz operated a labor-management consulting firm, and the FBI had information that he maintained numerous contacts with organized crime figures. FBI Agent John Insogna had been the "control agent" for Schultz since 1979 and had had over 200 contacts with Schultz between 1979 and 1985. As a result of the FBI's knowledge of Schultz's criminal activities, the FBI in early 1985 "closed [Schultz] out as an active informant."[6]

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[6] A confidential informant is one who is not required to give testimony in a judicial proceeding and whose identity is protected.

In late March of 1985, an associate of Schultz was arrested in possession of a half-kilogram of cocaine. Keith Corbett, the attorney with the Detroit Organized Crime Strike Force handling the Schultz prosecution, instructed Agents Insogna and Michael Carone to advise Schultz that the government had a prosecutable case against him and that the government intended to prosecute him unless he could offer substantial cooperation. Corbett's emphasis was upon "hard evidence" with which he could prosecute a major organized crime figure rather than upon intelligence information that Schultz had previously supplied. Corbett also suggested that any conversations Schultz might have relating to such a case should be recorded to obtain the best possible trial evidence.

Accordingly, Agents Insogna and Carone met with Schultz on March 22, 1985 at Buddy's Pizzeria in Farmington Hills, Michigan, and confronted him with the evidence the

government had against him. During the two-hour meeting the agents informed Schultz that the only way he could avoid prosecution or obtain favorable consideration was to provide the kind of cooperation that Strike Force attorney Corbett had outlined. In essence, the more Schultz could help the government with prosecutable cases, the more consideration he would receive with regard to the narcotics charges against him. The agents also informed him that his cooperation would require a more active role, that the FBI could not protect his identity, and that he might be required to testify in a judicial proceeding.[7] Schultz did not agree to

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[7] The testimony established that the FBI indefinitely protects the identity of a cooperating witness or a confidential informant, even if discontinued in that status, unless that person has to testify in

cooperate at the conclusion of the meeting, but after additional meetings with the agents during the following weeks, Schultz agreed to cooperate. Agent Carone then became Schultz's control agent, for Carone was the agent in charge of the Schultz narcotics case. The government gave Schultz until March of 1986 to provide assistance but the government decided in January of that year that Schultz would be unable to assist the FBI in any cases. The information that Schultz did provide to the FBI after March of

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7 (continued) a judicial proceeding. Schultz was ultimately convicted of the narcotics charges. He was indicted on March 27, 1986, though the indictment was sealed. It was unsealed on April 14, 1986, and the case was originally assigned to this court. As part of his defense at trial in February of 1987, Schultz revealed his status as an FBI informant.

1985 was inconsequential in the eyes of the FBI. Also in early 1985, FBI Headquarters in Washington, D.C., had initiated a wide-scale investigation into labor racketeering by organized crime in which several FBI offices in midwestern cities would participate simultaneously. The investigation was called "MIDRAC," an acronym for midwestern racketeering, and was directed primarily at three labor unions, the International Brotherhood of Teamsters (IBT), the Hotel Employees Union, and the Laborers International Union of North America. In addition, MIDRAC was an attempt to "get the movers and shakers of [La Cosa Nostra] leadership." According to the testimony, the MIDRAC investigative concept began in late 1984 and continued in its formative stages in early 1985. See Government Hearing Exhibits 1 & 2. The official kickoff of MIDRAC was in March of 1985 at a meeting in Washington, D.C.

Agent Clark Hall, the supervisor of the MIDRAC investigation at FBI Headquarters, testified that those persons in charge of the project in Washington considered the Detroit part of MIDRAC a major part of the investigation and crucial to the success of the project. Both Agents James Kopf, the agent in charge of MIDRAC in Detroit, and Agent Hall considered defendant Fitzsimmons to be a potential subject of the MIDRAC investigation from the onset, even though he was not a named subject in any relevant FBI documents.[8]

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[8] The testimony was conflicting on whether Fitzsimmons was an unnamed subject, a subject, a potential subject, or not a subject of MIDRAC. The court believes that Fitzsimmons was a potential subject of the MIDRAC investigation. Fitzsimmons was never identified in any FBI documents as being an actual subject of MIDRAC. The so-called

In December of 1984 and January of 1985, a confidential informant relayed information to Agent Joseph Kurgan about Fitzsimmons and possible wrongdoing in connection with a Commuter Limousine service that Fitzsimmons was planning to start. See Government Hearing Exhibit 17, 16, 15, 14. This information indicated that Fitzsimmons was in collusion with an official at Detroit Metropolitan Airport to set up his limousine service much faster and more easily than ordinarily would have been the case. Furthermore, the source told Kurgan that a Teamsters' business agent had a hidden interest in Fitzsimmons' company and that the agent was stirring up labor trouble at the unionized Shortway Charter Lines, the chief

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8 (continued) Commuter Limousine investigation, in which he was a subject, was a local Hobbs Anti-Racketeering Act investigation.

competitor of Fitzsimmons' company. On May 7, 1985, Kurgan received information from the confidential source that Fitzsimmons might have engaged in extortionate activities, which would have violated the Hobbs Anti-Racketeering Act, while he was starting his new commuter limousine service. See Government Hearing Exhibit 10. Kurgan opened a Hobbs Act investigation involving Fitzsimmons and Commuter Limousine Service on June 18, 1985, predicated upon the information received from the source on May 7, 1985. This investigation officially closed on September 16, 1987 for lack of prosecutive merit.

On April 27 or 28, 1985, Schultz contacted Agent Carone, who was located at a satellite FBI office in Troy, Michigan, and told him that Fitzsimmons wanted to meet with Schultz. Although Schultz did not know why Fitzsimmons wanted to meet with him, he suspected that the meeting might relate to Fitzsimmons' Commuter Limousine Service.

Agent Carone knew that Schultz had a reputation for addressing labor problems. Since the Schultz information did not relate to any investigation in Carone's office, Carone contacted Agent Kopf in the Detroit office and provided him with the information. Carone did not know that Fitzsimmons was under indictment until Kopf told him. Agent Kopf was interested in the information in light of the earlier source information concerning Fitzsimmons and Commuter Limousine Service and in light of the MIDRAC investigation. Agent Kopf testified that:

> Prior to this in late '84 and early '85, we had been receiving information concerning Mr. Fitzsimmons' involvement with Commuter Limo. That information indicated that Mr. Fitzsimmons was trying to use his influence as a former Teamster and his possible connection with some of the known organized crime people that we know

to have special favors with Commuter Limo.

As I say, Carone and I discussed what might be discussed and the fact that some of the names that were named subjects in the Mid-Rac case could possibly and would probably come up during this conversation, and we decided to seek authority to have Leonard Schultz wired to talk to Mr. Fitzsimmons.

Hearing Transcript 9-IV. Agent Carone substantiated this testimony:

Agent Kopf advised that there was another labor racketeering investigation that had begun earlier in 1985 which involved various organized crime figures in the area who we believed, from the information we were getting from other sources and from other divisions, FBI offices, may have

been involved in infiltration of the--of Teamsters Unions in this area.

* * *

Mr. Kopf advised that quite possibly a contact between Schultz and Fitzsimmons would be--would lend itself to further these investigations and that he would contact--make the appropriate arrangements to see if we could get authority to consensually monitor this meeting.

Hearing Transcript 22-I.

FBI procedure requires authorization by FBI Headquarters for the consensual tape recording of a conversation by a cooperating witness. The procedure also requires an opinion from a Strike Force attorney that the conversation with a cooperating witness as a participant will not legally entrap an unsuspecting participant in the conversation.

Agent Kopf telephoned Agent Hall at FBI Headquarters in Washington, D.C., informed him of the proposed meeting between Fitzsimmons and Schultz, and requested emergency authorization to record, with Schultz's consent, the conversation at the proposed meeting on May 1, 1985. Hall was the supervisor of the Organized Crime Section at FBI Headquarters. In addition, Hall was the FBI Supervisor of the Fitzsimmons indictment, and he was familiar with the overall investigation. Kopf told Hall that the anticipated subject of the meeting was Fitzsimmons' Commuter Limousine Service and that some of the named subjects of the MIDRAC investigation might be discussed. See also Government Hearing Exhibit 6.

Both Kopf and Hall were aware of the pending indictment against Fitzsimmons in the instant case, and they also knew that he had retained counsel. Hall discussed with Kopf the need to be careful to have the

cooperating witness not discuss the pending charges, for he did not want to compromise the integrity of the instant case. Kopf assured Hall that he was only interested in the possible relevancy of the meeting to the MIDRAC investigation, and Hall was satisfied that the integrity of the pending case would not be endangered. Kopf also told Hall that he had discussed the proposed monitoring with Strike Force attorney Keith Corbett, who had seen no entrapment problems with the proposed tape recording. Satisfied that the monitoring was proper and met with FBI safeguards, see Hearing Transcript 20-II, Hall gave emergency oral authorization for the consensual recording.

In recalling his conversation with Corbett, Kopf testified that he had explained the overall concept of MIDRAC, including some of the named subjects, and that he hoped the conversation between Fitzsimmons and Schultz would further that investigation. See Hearing Exhibit 4. Kopf also testified that

he mentioned to Corbett that the meeting was between Schultz and Fitzsimmons. Corbett, however, testified that he had no recollection of Kopf ever discussing with him the proposed consensual monitoring of the Schultz-Fitzsimmons meeting. In a confirming letter dated May 28, 1985, from the Detroit Office of the FBI to David McKeon, attorney in charge of the Detroit Strike force, the FBI represented that Corbett had been consulted on April 30, 1985 about a proposal to monitor a conversation. That letter, however, referred to the matter as a MIDRAC investigation together with some of its named subjects. Neither Fitzsimmons nor Schultz was named in the letter. See Government Hearing Exhibit 7.

The court believes that Kopf and Corbett discussed monitoring a Schultz conversation relating to MIDRAC but that Kopf either omitted or failed to make clear that the conversation would be between Schultz and Fitzsimmons. Corbett did not know about the

Schultz-Fitzsimmons meeting until Strike Force attorney John Newcomer, the principal trial attorney in the instant case, told him about it in late spring or early summer of 1985. Newcomer was neither informed nor consulted before the meeting "transpired,

On the basis of his conversations with Hall and Corbett, Kopf gave Agent Carone authority to record the proposed conversation between Schultz and Fitzsimmons. Kopf told Carone that Schultz should keep the conversation away from Fitzsimmons' indictment and that he was interested only in information concerning MIDRAC. Carone did not discuss the detaiLs of the pending indictment; nor did he even know the details of the indictment to even discuss it with Schultz.

At approximately 8:30 a.m. on May 1, 1985, Agents Carone and Insogna set up a tape recorder in Schultz's office. Schultz was required to sign an FBI form acknowledging the procedure, agreeing that he was a

voluntary participant, and agreeing to testify if requested. The agents explained to Schultz that he was not to discuss the case pending against Fitzsimmons and that if it came up he should only listen and then attempt to change the subject. In addition, the agents told Schultz not to suggest that Fitzsimmons should plead guilty or do anything else regarding the pending case. This preliminary meeting between the agents and Schultz lasted about 15 minutes, after which the agents left the premises. Fitzsimmons came to Schultz's office at about 9:00 a.m. and they talked for about one hour, which discussion Schultz recorded using the FBI equipment. After Fitzsimmons left, Schultz contacted the agents and they came and retrieved the tapes and the recording equipment. Schultz told the agents that Fitzsimmons had talked about a limousine service and that Fitzsimmons had wanted him to talk to someone. Agent Carone took the tape recording directly to Agent Kopf

without listening to it. Some weeks later Carone learned that Schultz had disregarded their directions and had discussed the pending case against Fitzsimmons.

The transcript of the May 1 conversation was prepared in two parts, totaling 77 pages. The initial part of the conversation relates to Fitzsimmons' Commuter Limousine Service. See generally May of 1985 Transcript, at 1-19. The government does not dispute that Schultz discussed the pending indictment and that Fitzsimmons made some inculpatory and exculpatory statements. The majority of the transcript relates to the Fitzsimmons indictment. For example, Schultz made the following statements:

> Fitzsimmons: "You know that thing I referred to."
>
> Schultz: "Yeah. You mean that one that you're indicted on?"
>
> Fitzsimmons: "No. This, this Commuter Limo." (Tr. p. 5).

* * *

Schultz: "Well, what do they really got you for?" (Tr. p. 23).

"I'm gonna tell ya, you, you're a sunk goose with these guys. You look like the fall guy the way you're talking." (Tr. p. 31).

* * *

"Whatta you do with your wife and kids? I don't know. Do you think if you pled guilty it would help you better?" (Tr. p. 45).

"Boy, you're in a bad spot. I'll tell ya that, Dick. I'd do a lot of thinkin' about this there. What do these guys mean to ya?" (Tr. p. 45).

* * *

"You gotta know somethin' you know." (Tr. p. 48).

* * *

"Maybe they're waitin' for you

to come to them." (Tr. p. 50).

* * *

"You, you just gotta go see somebody confidentially and, why say to 'em, hey, maybe I can't do nothin' here, but I sure can help you elsewhere. You know." (Tr. p. 63). "Well, that's where probably you should, ah, probably talk to somebody. You can't talk to your lawyer. You can't talk to your lawyer."

* * *

"You gotta go down to someone there confidentially sit down and say what can I do for myself (unintelligible) myself and get advice." (Tr. 2, p. 2).

* * *

"Ya know yeah I'll let ya know give ya a call but I gotta tell ya something Dick, you better put your thinking cap on. Save yourself.

I'd I'd hate to see you go from twenty-five seasons. You're you're gonna die there Dick." (Tr. p. 7). (See also, Exhibit 33, p. 2).

On May 3, 1985, a confidential source told Agent Kopf that Fitzsimmons wanted to arrange a meeting with him or someone else at the FBI, without counsel, to discuss cooperating with the government. On May 6, 1985, Kopf and Agent Christine Simpson, who was working on the pending case against Fitzsimmons, went to see Strike Force Attorney Newcomer and informed him of Fitzsimmons' request. Newcomer was concerned about a meeting in which the defendant's counsel would be absent, and he wanted to research the matter and consult with other attorneys before the FBI proceeded any further.

Newcomer consulted with McKeon, Maura Corrigan, then Chief of the Appellate Section of the United States Attorney's Office for this district, and Paul E. Coffey, Deputy

Chief of the Organized Crime and Racketeering Section in Washington, D.C., and concluded that a meeting between Fitzsimmons alone and the government could not take place properly without some sort of prior judicial proceeding in which Fitzsimmons would either waive his right to counsel or have new counsel appointed. On May 9, 1985, Newcomer wrote a letter to the Special Agent in Charge of the Detroit FBI Office outlining these conclusions and emphasizing that no contact should be made with Fitzsimmons without his attorney until these precautions were taken. Fitzsimmons, apparently unwilling to appear before a magistrate, did not meet with the government agents. In addition, Fitzsimmons' terms of cooperation--a dismissal of all charges or a promise of no incarceration--were unacceptable to the government.

After May 9, 1985, but before May 17, 1985, Kopf and Simpson went to Newcomer with the May 1 tape recording and explained the

history surrounding it. Agent Simpson was excited about the value of the tape, expressing her opinion that Fitzsimmons' statements were very inculpatory. She also thought that the tape could have a bearing on the decision to meet with Fitzsimmons about his proposed cooperation.

Newcomer listened to the tape recording but disagreed with Agent Simpson's evaluation of Fitzsimmons' statements. He told Kopf and Simpson to transcribe the tape and also asked if anyone had approved of the recording. The agents indicated that they had obtained authorization. Newcomer assumed that Corbett had approved of the recording and so he asked Corbett, who informed him that he knew nothing about the matter.

In a memorandum dated May 17, 1985, Newcomer explained to Coffey that he had outlined to the FBI the limitations on any direct contact with Fitzsimmons. He also advised Coffey of the May 1 recording and the surrounding circumstances, including

Schultz's efforts to get Fitzsimmons to cooperate. Newcomer opined that the tape recording was of marginal, if any, evidentiary value and that at that time he did not anticipate using it at trial, except as possible impeachment material should Fitzsimmons testify at trial. Newcomer did state, however, that "[i]t is too late to isolate trial counsel from any taint which might accompany the existence of or knowledge of the recorded statements of Fitzsimmons."

Newcomer did nothing more about the tape recording of the May 1 conversation until the FBI provided him with a transcription in September of 1985. He read the transcript and still felt that its evidentiary value was minimal. The following month Strike Force attorney Peter Sprung was assigned to assist Newcomer in the upcoming trial of the defendants. When Sprung arrived in Detroit from Washington, D.C., Newcomer gave him a transcript of the May 1 conversation and asked him to review it. Newcomer asked

Sprung to consider specifically whether the tape had any substantive evidentiary value for use at trial, whether the use of the tape would implicate constitutional or other legal issues, and whether the recording constituted discoverable material, either under F.R.Crim.P. 16 or **Brady**.

Sprung concluded from his review that the tape had no evidentiary value, finding that while Fitzsimmons had made some inculpatory admissions, they were only weakly incriminating and mischaracterized the nature of Fitzsimmons' role. On the issue of the tapes' discoverability, Sprung did not believe that the tapes contained **Brady** material. He felt, however, that the **Brady** issue was a close question. He thought that the tape and transcript should be submitted to the court for its *in camera* review with respect to the discovery issue. Sprung further recommended to Newcomer that they request a protective order from the court on the basis of the need to protect the

integrity of the ongoing, separate investigation in the Commuter Limousine case and to protect the identity of Schultz as a confidential informant.

On October 30, 1985, Newcomer submitted to the court a motion for a protective order, as well as an offer of proof explaining the factual background of-the recorded conversation, which he prepared with Agents Simpson and Kopf. See Attachment B. The court granted the motion and issued a protective order on November 19, 1985. See Attachment A.

Both Newcomer and Sprung testified that, once the protective order issued, they stored the only copies of the transcripts they had in locked filing cabinets and did not remove them during the entire course of the trial. They also testified that they had made no use of the contents of the transcript in preparation for trial or during the trial itself.

Following Schultz's narcotics trial in which he revealed his FBI informant status and following the trial of this case, Sprung periodically reminded Newcomer about the sealed evidence. Newcomer in turn would question Agent Kopf about the status of the Commuter Limousine case. Kopf told Newcomer on July 27, 1987 that the investigation was closed, following which the government filed its motion to unseal the tape on August 12, 1987.

II. SPECIFIC FINDINGS AND CONCLUSIONS

A. Sixth Amendment

From these facts, some of which the court will expand upon further, the court concludes that the government violated the sixth amendment[9] but that a new trial is not

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[9] The Sixth Amendment states in relevant part that the accused shall "have the assistance of counsel for his defence."

warranted because of the lack of prejudice to the defendants.

The evidentiary hearing in part concerned the "separate offense" exception of **Massiah** v **United States**, 377 U.S. 201 (1964). In **Massiah**, the defendant had been indicted and was represented by counsel when a codefendant decided to cooperate with the government in its continuing investigation of the defendant's alleged narcotics activities. A radio transmitter was installed under the front seat of the codefendant's car so that a government agent could overhear conversations between the codefendants. One evening the codefendants engaged in a conversation in the car during which the defendant Massiah made several incriminating statements that the agent testified about during Massiah's jury trial. The Supreme Court held

> that the petitioner was denied the basic protections of [the sixth amendment] when there was used against him at his trial evidence

> of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of counsel.
>
> * * *
>
> We do not question that in this case, as in many cases, it was entirely proper to continue an investigation of the suspected criminal activities of the defendant and his alleged confederates, even though the defendant had already been indicted. All we hold is that the defendant's own incriminating statements, obtained by federal agents under the circumstances . . . could not be used . . . against him at his trial.

Id. at 206-07 (emphasis added and in original).

In **Weatherford** v **Bursey**, 429 U.S. 545 (1977), an undercover government agent was arrested along with the defendant Bursey. To protect his identity, the agent continued the facade of being an arrested defendant and retained counsel. He also met with defendant Bursey and Bursey's counsel and the impending trial was discussed. The agent did not inform the prosecutor or the prosecutor's office of any details regarding the criminal action. The Supreme Court held in the subsequent civil rights case that the agent did not violate Bursey's sixth amendment right to counsel, stating: "[Wlhen conversations with counsel have been overheard, the constitutionality of the conviction depends on whether the overheard conversations have produced, directly or indirectly, any of the evidence offered at trial." Id. at 552. Because the agent did not communicate anything to the prosecutors, there was no sixth amendment violation. The court noted, however that

> [h]ad Weatherford testified at Bursey's trial as to the conversations between Bursey and [his counsel]; had any of the State's evidence originated in these conversations; had those overheard conversations been used in any other way to the substantial detriment of Bursey; or even had the prosecution learned from Weatherford, an undercover agent, the details of the Bursey-Wise conversations about trial preparations, Bursey would have a much stronger case.

Id. at 554.

In **United States** v **Henry**, 447 U.S. 264 (1980), the Court considered whether the sixth amendment was violated when incriminating statements made by an indicted and represented defendant to his cellmate, an undisclosed by an indicted and represented defendant to his cellmate, an undisclosed

government agent were admitted at his trial. The **Henry** Court applied the "deliberately elicit" test of **Massiah** and concluded that the government informant had "deliberately used his position to secure incriminating information from [the defendant] when counsel was not present." Id. at 270. This sixth amendment violation occurred even though the informant had not questioned the defendant. Moreover, the government agent had instructed the informer to be alert to the defendant's statements but not to initiate any conversations or question him about the bank robbery. The informant had, however, "stimulated" conversations with the defendant, and the informant's actions amounted to "indirect and surreptitious interrogatio[n]" of him: "By intentionally creating a situation likely to induce Henry to make incriminating statements without the assistance counsel, the Government violated Henry's Sixth Amendment right to counsel." Id. at

273-74.

In **United States** v **Morrison**, 449 U. S. 361 (1981), federal agents, aware that the defendant had been indicted and had retained counsel, met with the defendant without counsel present and sought her cooperation in a related investigation. The agents disparaged defendant's counsel and attempted to persuade her to cooperate. The agents met with the defendant a second time, again without counsel present, but the defendant did not agree to cooperate and she did not make any incriminating statements. The appellate court held that the sixth amendment right to counsel had been violated and dismissed the indictment. The Supreme Court assumed that the sixth amendment was violated and held that the dismissal of the indictment was inappropriate absent a showing of prejudice to her representation or to the fairness of the criminal proceedings. Id. at 365. "Here, respondent has demonstrated no prejudice of any kind, either transitory or

permanent, to the ability of her counsel to provide adequate representation in these criminal proceedings. There is no effect of a constitutional dimension which needs to be purged to make certain that respondent has been effectively represented and not unfairly convicted." Id. at 366.

In **Maine** v **Moulton**, 474 U.S. 159 (1985), the indicted defendant, represented by counsel, agreed to meet with a codefendant and his lawyer to plan defense strategy for the upcoming trial. The codefendant had agreed to cooperate with the government and to wear a body transmitter. The codefendant recorded the defense meeting at which he caused Moulton to make incriminating statements. Those statements were admitted at the defendant's trial. The Supreme Court held that the admission at trial of the incriminating statements violated the defendant's sixth amendment right to counsel. Because the very purpose of the meeting was to discuss defense strategy, the police knew

that Moulton would make statements that he had a Constitutional right not to make without the assistance of counsel. Id. at 177. The Court found it irrelevant that the police had a legitimate interest in investigating another crime--Moulton's intention to kill a witness:

> The police have an interest in the thorough investigation of crimes for which formal charges have already been filed. They also have an interest in investigating new or additional crimes. Investigations of either type of crime may require surveillance of individuals already under indictment. Moreover, law enforcement officials investigating an individual suspected of committing one crime and formally charged with having committed another crime obviously seek to discover evidence useful at a trial

of either crime. In seeking evidence pertaining to pending charges, however, the Government's investigative powers are limited by the Sixth Amendment rights of the accused. To allow the admission of evidence obtained from the accused in violation of his Sixth Amendment rights whenever the police assert an alternative, legitimate reason for their surveillance invites abuse by law enforcement personnel in the form of fabricated investigations and risks the evisceration of the Sixth Amendment right recognized in **Massiah**. On the other hand, to exclude evidence pertaining to charges as to which the Sixth Amendment right to counsel had not attached at the time the evidence was obtained, simply because other charges were pending at that time, would

> unnecessarily frustrate the public's interest in the investigation of criminal activities. Consequently, incriminating statements pertaining to pending charges are inadmissible at the trial of those charges, notwithstanding the fact that the police were also investigating other crimes, if, in obtaining this evidence, the State violated the Sixth Amendment by knowingly circumventing the accused's right to the assistance of counsel.

Id. at 179-80 (footnotes omitted).

More recently, in **Kuhlmann** v **Wilson**, 477 U.S. 436 (1986), the defendant was arraigned on robbery and murder charges and placed in a cell with a prisoner who was a police informant. The prisoner had agreed to listen to the defendant's conversations and report them to a detective. The detective

had instructed the prisoner not to question the defendant but to "keep his ears open" for other perpetrators. In the cell the defendant told the same story that he had given to the police upon his arrest, prompting the informant to respond with disbelief (the story "didn't sound too good"). The defendant changed his story over the next few days and eventually admitted to the crimes. The prisoner, who had taken notes of the statements, informed the detective of what he had heard, and the statements were introduced at trial. The Supreme Court held that there was no sixth amendment violation because the informant did not stimulate conversations about the crimes charged.[10] The detective had instructed the

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[10] This holding was an alternate holding and rested largely on according the state trial court's factual findings the presumption of correctness as required in a habeas corpus case.

prisoner only to listen to the defendant and the prisoner had in essence followed those instructions. Thus, the admission at trial of the defendant's incriminating statements did not violate the sixth amendment. Id. at 459-60; see also **Beatty** v **United States**, 389 U.S. 45 (1967) (per curiam).

Applying the above authorities to the facts of this case, the court finds that defendant Fitzsimmons' sixth amendment right to counsel was violated when Schultz engaged him in extensive conversation about the pending indictment in the absence of his counsel, which included disparaging his counsel and suggesting that Fitzsimmons cooperate with the government. While the court finds that the FBI had a legitimate interest in recording the conversation as possibly relating to the MIDRAC investigation, that interest does not shroud Schultz with the authority to interrogate Fitzsimmons about the charges on which the grand jury had indicted him. Without

uestion, Schultz had an interest in trying o elicit information from Fitzsimmons about he pending indictment and to have him ooperate with the government. As Agents arone and Insogna emphasized, he was facing erious drug charges and it was in his nterest to help the government. Given both itzsimmons' and Schultz's situation, it is ot surprising that the pending indictment as discussed. Moreover, the government's nstructions for Schultz not to discuss the ndictment do not remedy Schultz's express iolation of those instructions. Without a oubt, Schultz "took some action, beyond mere istening, that was designed deliberately to licit incriminating remarks." Kuhlmann, 477 .S. at 459. The inquiry does not end, owever, for the defendants must show rejudice to warrant a new trial.

Both **Morrison** and **United States** v **teele**, 727 F2d 580 (6th Cir), cert. denied, 67 U.S. 1209 (1984), require a showing of rejudice to obtain relief for a sixth

amendment violation. In **Steele**, the United States Court of Appeals for the Sixth Circuit mentioned three factors relevant to the prejudice inquiry:

* * *

> (2) whether the government obtained, directly or indirectly, any evidence which was used at trial as the result of the informant's intrusion;
>
> (3) whether any information gained by the informant's intrusion was used in any other manner to the substantial detriment of the defendant; and
>
> (4) whether the details about trial preparations were learned by the government.

Id. at 585. Applying these factors, the court does not find any prejudice resulting from the May 1 transcript to which the government prosecutors were privy. First, the government admits that Fitzsimmons made

some important admissions: that Towne hired Mrs. Fitzsimmons and paid her $11,000; that Towne wanted Fitzsimmons to work for him after Fitzsimmons' release from prison; that Porter paid Fitzsimmons $400 a month; that Towne paid for Fitzsimmons' hotel rooms in Miami, Washington, and California; and that Fitzsimmons "brought [Brown and Towne] in on the . . . dental program." Those statements were not introduced at trial, however Fitzsimmons did not testify at trial and so the statements were also not used as impeachment material.

Second, the court finds that the transcript did not provide the government with any substantive information that it did not already have. The court agrees with the government's contentions that the conversation tracks the charges against Fitzsimmons as alleged in the indictment. Further, Fitzsimmons' attorney was not present at the Schultz-Fitzsimmons meeting, and Fitzsimmons did not reveal any

attorney-client communications. In large part, Fitzsimmons generally denied the charges against him. To the extent that he discussed specific facts, the court finds that the government was aware of them--specifically, that Fitzsimmons resigned from the Fund on January 2, 1980; that he never got a job from Towne after he returned from prison; that the payments from Porter were backed by "IOU's" and thus assumed the form of loans; and that Brown only paid his hotel bills and not his airfare in connection with the trips to Miami, Washington, D.C., and Los Angeles. The court can find no particular defense strategy that the transcript revealed to the government. See United States v Kilrain, 566 F.2d 979, 982 (5th Cir. 1978). Fitzsimmons has not shown that the transcript provided the government with any evidence used at trial, either directly or indirectly. See Steele, 727 F.2d at 586.

Finally, Fitzsimmons did not offer any testimony suggesting that either his attorney-client relationship or his defense at trial was adversely affected by his conversation with Schultz that the government recorded. There is no prejudice resulting from the sixth amendment violation for which a remedy should be granted;[11]

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[11] The court also does not find that Schultz or the government invaded the defense camps of defendants Collins, Schwartz, or Towne. Nothing in the transcript relates to the trial strategy of or the charges against those defendants. Those defendants may not vicariously assert Fitzsimmons' sixth amendment right. See **United States** v **Payner**, 447 U.S. 727 (1980); **United States** v **Fortna**, 796 F.2d 724, 733-34 (5th Cir. 1986); **United States** v **Valencia**, 541 F.2d 618, 621-22 (6th Cir. 1976). While Fitzsimmons did discuss his involvement with

B. Fifth Amendment, Rule 16, and **Brady**

The defendants also contend that the government acted improperly in failing to disclose the Schultz-Fitzsimmons meeting and in misleading the court in its offer of proof. See Attachment B.

When the government attorneys received the transcript they acted within the bounds of the law by submitting it to the court for judicial review and by seeking a protective order under F.R.Crim.P. 16(d)(1). While the court does find that the offer of proof was

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11 Towne, the statements basically track the allegations in the indictment. Fitzsimmons made only two references to Collins, but there has been no showing how either reference furthered the government's case. Similarly, Fitzsimmons referred to Schwartz only twice but neither reference has been shown to have furthered the government's case.

misleading in certain respects, as was some of the testimony and exhibits at the hearing, this finding does not amount to a

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11 In addition, both of the prosecuting attorneys testified that they regarded the evidentiary value of the taped conversations as marginal; that they did not review the transcript during trial preparation or during the course of the trial; and that to the best of their knowledge, they did not use any information from the transcript to prepare the government's case.

Nor does the court find any need to grant a new trial because government agents may have instructed or allowed confidential informants to contact Fitzsimmons in regard to cooperating with the government. Fitzsimmons never cooperated. He has not demonstrated any prejudice in this regard, and there is evidence that Fitzsimmons himself suggested possible cooperation.

denial of the defendants' right to a fair trial or a **Brady** violation. Again, the court does not find a sufficient amount of prejudice to the defendants to warrant a new trial.

As mentioned, the court has found that the reasons for recording the Schultz-Fitzsimmons conversation were legitimate, for it was potentially related to the MIDRAC investigation of which Fitzsimmons was a potential subject. The conversation may have implicated high-level organized crime figures who were subjects of MIDRAC. The exhibits and testimony bear this finding out. The subsequent events, however, trouble the court.

Specifically, the court cannot square the government's argument in its October 1985 offer of proof that Fitzsimmons was "part of and one of the subjects of [MIDRAC] "with its subsequent categorization of Fitzsimmons and the May 1 transcript as relating to the Commuter Limousine investigation. The

Commuter Limousine investigation by Agent Kurgan was not a nationwide investigation and it was not related to MIDRAC; it was strictly a local Hobbs Anti-Racketeering Act investigation. Moreover, Agent Kurgan did not receive the Schultz-Fitzsimmons transcript for possible use in his investigation until 1986, well after the government's offer of proof in which it apparently asserts Kurgan's investigation as the one in need of Protection from disclosure. Kurgan opened his investigation on June 19, 1985 on the basis of the May 7, 1985 source information.[12] Therefore, to assert in October of 1985 that the

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12 The court also does not think that this Hobbs Act investigation was a so-called "Son of MIDRAC," for Kurgan's investigation opened up from his May 7, 1985 source information and it was never cross-referenced to MIDRAC.

Schultz-Fitzsimmons conversation is related to the nationwide MIDRAC investigation and to assert later that it is related to the local Hobbs Act investigation is disingenuous. The Kopf Affidavit of February 8, 1988 is also somewhat misleading, for it implies that a reason for recording the May 1 conversation was source information about Fitzsimmons using his influence to secure contracts for his limousine service. That source information, however, was not received until May 7, 1985 by Agent Kurgan. See Government Hearing Exhibit 10.

Nevertheless, the court is convinced that the transcript was properly sealed to protect Schultz's identity. While he was not a high-level FBI informant at the time of the offer of proof, FBI policy is to protect his identity until his testimony is needed at trial.

Furthermore, the defendants have suffered no prejudice from the lack of disclosure. This court reviewed the

transcript before trial and held that it did not contain exculpatory evidence under **Brady**. That ruling has not been challenged by Fitzsimmons or Collins.[13]

Defendant Schwartz focuses on an exchange in which Schultz states that Fitzsimmons is "in a bad spot" and asks him what "these guys" mean to him. Fitzsimmons replies that he does not know what their "deal" is and that he knows nothing about Sol Schwartz. Schwartz argues that, if he had known of this evidence, he would have used it "to contradict and undermine the government's conspiratorial theory." The court does not agree.

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[13] To avoid further inundating the court with pleadings, defendant Collins adopted the submissions of the codefendants. Collins did file a brief in support of his motion for a new trial prior to the evidentiary hearing, however.

The government did not take the position at trial that Fitzsimmons knew what Schwartz and Dorfman were getting in return for helping Brown; the government's proofs showed that Schwartz and Dorfman prided themselves on the fact that their coconspirators in the Fund were ignorant of their "deal." In addition, the evidence showed that the two men routinely attended Trustee meetings together (see GX 37; 22 Trial Tr. 104); that Fitzsimmons frequently called the office of Schwartz and Dorfman (GX 356); and that, while Fitzsimmons was in prison, he expected Schwartz and Dorfman to "cover all of his . . . bills." (See GX 2SB, at 11). The intercepted conversations between Schwartz and Dorfman indicate that Schwartz was familiar with Fitzsimmons' participation in the charged conspiracy. (See GX 24B, at 9; GX 2SB, at 3, 11, 15; GX 27B, at 3-4, GX 33B, at 1-2). Finally, a general rule of conspiracy law is that "[i]t is not necessary . . . for all coconspirators to

know each other or to have worked together on all phases of the criminal enterprise." **United States** v **Winship**, 724 F.2d 1116, 1122 (5th Cir. 1984).

Similarly, defendant Towne's contention that he could have used the transcript at trial does not warrant a new trial. To be entitled to a new trial on **Brady** grounds, there must be "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." **United States** v **Bagley**, 473 US 667, 682 (1985).[14] On the whole, the court finds that

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[14] To support a motion for a new trial on the basis of newly discovered evidence, the defendant must show that "the evidence (1) was discovered only after trial, (2) could not have been discovered earlier with due diligence, (3) is material and not merely cumulative or impeaching, and

while the transcript may have been useful to the defendants, it would not have changed the outcome of the trial.

III. CONCLUSION

For the above reasons, the defendants' motions for new trials are DENIED. The government shall submit an appropriate order.

RALPH M. FREEMAN
United States District Judge

Dated: September 29, 1989.

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14 (continued)

(4) would likely produce an acquittal if the case were retried." **United States** v **Barlow**, 693 F2d 954, 966 (6th Cir 1982). The defendants have not met the **Bagley** or **Barlow** standard.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

UNITED STATES OF AMERICA,	
Plaintiff,	Criminal Action
v	No. 84-20715
FRANCIS RICHARD FITZSIMMONS, et al.,	Hon. Ralph
Defendant.	M. Freeman

PROTECTIVE ORDER

The government having filed, pursuant to Rule 16(d)(1), Federal Rules of Criminal Procedure, a Motion in Limine for Protective Order Regarding Defendant Fitzsimmons, and also having filed, in camera and ex parte, an Offer of Proof Regarding Evidence as to Which the Government Seeks a Protective Order together with Attachment 1, and the Court, having reviewed all of the material submitted, including the Defendant

Fitzsimmons' Response in Opposition to such Motion, and the Court being fully advised in the premises;

IT IS HEREBY ORDERED:

That, although Attachment 1 would ordinarily be subject to discovery and inspection by the Defendant Fitzsimmons in accordance with Rule 16(a)(1)(A), Federal Rules of Criminal Procedure, because of the special circumstances in this case, as outlined in the Government's Offer of Proof Regarding Evidence as to Which the Government Seeks a Protective Order, discovery of Attachment 1 would not be necessary and appropriate, and would be deferred until such time when, because the special circumstances may have changed, it would no longer be necessary to restrict discovery of this material;

That Attachment 1 does not contain exculpatory information within the meaning of **Brady** v **Maryland**, 373 US 83 (1963).

That should the government elect to offer this material into evidence during the trial, or should they elect to use the material during the presentation of any evidence by the defendants, then discovery and inspection of this material would no longer be deferred and the government would be compelled to disclose Attachment 1, pursuant to the **Jencks** Act, Title 18, United States Code, Section 3500.

Honorable Ralph M. Freeman
United States District Judge

Dated: November 19, 1985.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

UNITED STATES OF AMERICA,	
Plaintiff,	Criminal Action
v	No. 84-20715
FRANCIS RICHARD FITZSIMMONS, et al.,	Hon. Ralph
Defendant.	M. Freeman

_____/

ORDER GRANTING GOVERNMENT'S MOTION TO SEAL OFFER OF PROOF

The government having filed a motion to seal and the court being fully advised on the premises;

IT IS HEREBY ORDERED that the Offer of Proof and Attachment 1 be and is hereby sealed.

_____

HONORABLE RALPH M. FREEMAN

UNITED STATES DISTRICT COURT JUDGE

Dated: November 19, 1985.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

UNITED STATES OF AMERICA,	
Plaintiff,	Criminal Action
v	No. 84-20715
FRANCIS RICHARD FITZSIMMONS, et al.,	Hon. Ralph M. Freeman
Defendant.	

OFFER OF PROOF REGARDING EVIDENCE AS TO WHICH THE GOVERNMENT SEEKS A PROTECTIVE ORDER

NOW COMES the United States of America, by and through its attorneys Joel M. Shere, United States Attorney, and John L. Newcomer, Special Attorney, United States Department of Justice, and as an offer of proof of evidence as to which it seeks to

restrict discovery of evidence regarding the Defendant Fitzsimmons, states as follows:

1. That commencing in January, 1985 and continuing to the present, Special Agents of the FBI are conducting a nationwide investigation into organized crime influenced labor racketeering offenses. Defendant Richard Fitzsimmons, through his past and current associations with the International Brotherhood of Teamsters, and his association with Airport Limousine Services, Inc., is part of and one of the subjects of the national investigation. This investigation is separate and completely unrelated to the charges contained in the indictment which are the subject matter of this cause.

2. That during the course of that investigation, on or about April 30, 1985, an FBI top echelon criminal informant, whose identity at this time must remain protected, reported to the FBI that the Defendant Fitzsimmons had recently contacted him on several occasions and requested his

assistance in helping him with a "problem" with regard to Airport Limousine Services, Inc. and other union matters. That meeting was scheduled to take place on May 1, 1985 at the office of the criminal informant.

3. That the criminal informant and the FBI agents believed, in good faith, that Fitzsimmons would possibly request the assistance of the informant and that that assistance would involve criminal activities, and that the requested meeting would involve discussions of a conspiratorial nature. It was the understanding of the agents that the meeting and anticipated conversation would relate only to the investigation then currently pending and would be unrelated and irrelevant to the charges then pending against Defendant Fitzsimmons in this cause.

4. That on May 1, 1985, the FBI, through their internal administration, authorized and assisted the criminal informant and Fitzsimmons would be recorded

and preserved as evidence of potential crimes.

5. That at approximately 9:00 a.m. on May 1, 1985, the criminal informant and Fitzsimmons and a meeting in the office of the informant for approximately one hour, and the conversations of both the criminal informant and the Defendant Fitzsimmons were recorded. The anticipated conversations which related to the purposes for which Fitzsimmons had requested the meeting were recorded and do not relate in any way to the indictment in this cause. However during the course of the recorded meeting between the criminal informant and Fitzsimmons, the discussion turned to Fitzsimmons' involvement and some of the facts and circumstances surrounding the indictment in this cause. During this part of the discussion, recorded and now recently transcribed, the Defendant fitzsimmons made statements to the criminal informant which are both self-serving and inculpatory with regard to his conduct

relevant to the charges set forth in the indictment in this case. We are enclosing, under seal, a copy of a transcript of that recorded conversation for the Court's in camera review. This transcript is in two parts, one 65 pages, and the other 13 pages). (See Attachment 1).

6. That the government is presently engaged in preparation for trial and has not yet decided whether or not it will offer the recorded evidence at the trial either as part of its case in chief or as rebuttal during any potential cross-examination of the Defendant Fitzsimmons during the presentation of any defense, or either one. In the event that the government offered the evidence as part of its case in chief then the statements would become relevant and disclosure would be called for pursuant to the Jencks Act.

7. That the government believes that this information is not discoverable pursuant to Rule 16, Federal Rules of

Criminal Procedure or the Jencks Act (18 U.S.C. Section 3500) at this time. It is our view that the evidence is certainly not exculpatory and is not discoverable as **Brady** evidence.

8. That it is the government's position that, although the evidence could become relevant if we decided to use the evidence during the trial, at which time disclosure would be made in accordance with the **Jencks** Act, it is not discoverable at this time. Disclosure at this time would severely curtail the ongoing investigation of Fitzsimmons and others. The effectiveness of the criminal informant for any further use he might provide to either the continuing investigation into Mr. Fitzsimmons' suspected criminal activities or other matters, would be lost, and any disclosure would place the life and the personal welfare of the criminal informant in serious jeopardy.

9. That assuming, arguendo, that the Court were to rule that this evidence is

discoverable to the Defendant pursuant to any of the above reasons already described, the government would seek a Protective Order at this time that would delay furnishing this information to the Defendant until such time when it is offered at trial.

WHEREFORE, the government moves that the Court find that this evidence is not discoverable pursuant to Rule 16, Federal Rules of Criminal Procedure, the Jencks Act (18 U.S.C. Section 3500) or pursuant to **Brady** v **Maryland**, 373 U. S. 83 (1963). In the alternative, if the Court rules that it is discoverable, we request the Court to issue a Protective Order pursuant to Rule 16(d)(1), allowing the government to delay furnishing this information until such time when and if it is offered.

Respectfully submitted,

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Dated: October 30, 1985.

91-955

Supreme Court, U.S.
FILED
JUL 5 1991
OFFICE OF THE CLERK

No. 87-1284/2038; 87-1286/2072

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

FRANCIS R. FITZSIMMONS and

ROGER TOWNE (Petitioners)

-vs-

UNITED STATES OF AMERICA (Respondent)

APPENDIX

VOLUME VII

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Tapp.

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NOT RECOMMENDED FOR PUBLICATION

Nos. 87-1283/1284/1285/1286/2038/2072

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

	) ON
	) APPEAL
UNITED STATES OF AMERICA,	) FROM
Plaintiff-Appellee,	) THE
CHARLES F. COLLINS	) UNITED
(87-1283);	) STATES
FRANCIS R. FITZSIMMONS	) DISTRICT
(87-1284/2038);	) COURT
SOL SCHWARTZ (87-1285);	) FOR THE
ROGER TOWNE (87-1286/2072),	) EASTERN
Defendants-Appellants.	) DISTRICT
	) OF
	) MICHIGAN

NOT RECOMMENDED FOR FULL TEXT PUBLICATION

Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in

a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court. This notice is to be prominently displayed if this decision is reproduced.

Decided and Filed _____

BEFORE: JONES and NORRIS, Circuit Judges; JARVIS, District Judge.*

ALAN NORRIS, Circuit Judge. After a nine-month trial, a jury found Charles Collins, Francis Fitzsimmons, Sol Schwartz and Roger Towne guilty of conspiring to conduct a racketeering enterprise in violation of 18 U.S.C. Section 1962(d). The jury also found defendant Collins guilty of

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*The Honorable James H. Jarvis, United States District Judge for the Eastern District of Tennessee, sitting by designation.

accepting things of value in violation of 18 U.S.C. Section 1954, and of participating in the conduct of an enterprise's affairs through a pattern of racketeering activity in violation of 18 U.S.C. Section 1962(c). The government charged that between the years 1979 and 1983, defendants had formed an association-in-fact which distributed health care plan contracts in exchange for kickbacks, trips, entertainment and promises of future employment.

Defendants appeal their convictions arguing: (1) prosecutorial misconduct; (2) erroneous admission of hearsay testimony; (3) failure to deliver **Brady** exculpatory material to the defense; (4) failure to allege a Racketeer Influenced and Corrupt Organizations Act **("RICO")** enterprise; (5) erroneous jury instructions allowing the jury to rely on non-crimes in convicting defendants of conspiracy; and (6) inflammatory rebuttal remarks by the prosecution. For the reasons that follow, we

affirm the convictions of defendants Collins, Fitzsimmons, and Towne, but reverse the conviction of defendant Schwartz.

I.

The Michigan Conference of Teamsters Welfare Fund ("the Fund") is an employee health care benefit plan for approximately 60,000 Michigan Teamsters and their families. From 1979-1983, the Fund was governed by four trustees, two representing labor and two representing management. Defendant Frank Fitzsimmons was a labor trustee for the Fund until January 2, 1980, when he resigned as a result of a conviction on an unrelated criminal charge. The Fund is subject to federal regulation under ERISA 29 U.S.C. Section 1001 et seq. The trustees meet monthly to decide questions of policy. However, defendant Charles Collins, executive director of the Fund, and his staff handled the day-to-day operation.

Defendant Schwartz, together with his close associate Allen Dorfman, operated

Federal Services Inc. ("FSI"), which provided claims processing services to the Fund. They also operated FSI's subsidiary, Federal Computer Services, Inc. ("FCS"), which provided computer services to the Fund. Defendant Roger Towne and his associate Edward Brown were principals of several health care delivery companies, including Delaware Professional Services, Inc. ("DPS"), and Combined Professional Services, Inc. ("CPS"). These companies design and administer health care benefit plans in return for an administrative fee, normally stated as a percentage of the total amount of medical claims. Terry Porter, who was acquitted on all counts below, was an associate and friend of both Towne and Fitzsimmons.

The government's evidence at trial established that Brown and Towne gave money and other things of value to Collins, Fitzsimmons, Schwartz and Dorfman, because of their positions of influence with the Fund,

in order to secure contracts to administer health care plans for the Fund.

A. Brown's and Towne's Initial Contact with the Fund and Things of Value Accepted by Collins

In 1979, Brown and Towne offered a new health care delivery system to the Fund. The system, called a "closed-panel" system was designed to provide cost containment by requiring union members to use designated physicians. Brown and Towne turned to Towne's friend, Terry Porter, seeking an introduction to Frank Fitzsimmons, a trustee of the Fund. In return for the introduction, Brown promised to pay Porter a one dollar commission for every Teamster registered in their program.

Porter introduced Brown to Fitzsimmons, and Fitzsimmons, in turn introduced Brown to Collins. In the winter of 1979, Brown and Towne met with Collins on several occasions regarding the proposed health care system. Collins informed them

that, at the present time, the Fund was more interested in a dental contract than a medical contract. As a result, Brown decided to propose a package of dental benefits to the Fund (the "DPS dental plan").

Brown and Towne later learned that Dorfman and Schwartz were highly influential with Fund officials and their approval was a prerequisite for doing business with the Fund. In April 1979, Brown introduced himself to Schwartz telling Schwartz that Collins had suggested that Brown call Schwartz to discuss the DPS proposal. The next day, Schwartz discussed the proposal with Collins in a telephone conversation. Schwartz, whose phone was wiretapped because of a separate federal investigation, told Collins that "the potential here [with the DPS dental plan] is staggering if we, you and I, go about it right." Schwartz lobbied the trustees for approval of the dental plan. Although one of the trustees suspected Dorfman and Schwartz of having a financial

interest in the plan, Brown allayed their fears by representing that no person associated with the Fund had a financial interest in the plan.

In May 1979, the trustees instructed Collins to seek competitive bids for a dental plan. Collins did so, but failed to tell competing bidders that they were seeking a "closed-panel" plan. As a result both competing bidders failed to submit acceptable proposals with competitive pricing. On May 24, 1979, the Board met to consider the proposals and, on June 1, voted to accept the DPS dental plan.

Between May 27 and June 6, 1979, Towne gave Collins two round-trip airline tickets between Detroit and Chicago, and was reimbursed by DPS. Brown and Towne also regularly socialized with Collins in Detroit area bars and restaurants, picking up his tab. Towne submitted vouchers for the cost of entertaining Collins on thirty-three occasions in 1979, sixty occasions in 1980,

and seventy-nine occasions in 1981. In addition, Brown put Collins' girlfriend, Lesa Young, on the DPS payroll, giving her minimal responsibilities. He instructed her to be Collins' paramour and ensure that Collins, who suffered from a drinking problem did not disclose his relationship with DPS. Collins and Young also took several pleasure trips, and lived at an apartment for five months at DPS expense.

Also in 1979, Collins suggested that Brown and Towne develop an optical plan for the Fund. In early 1980, the trustees approved the plan. In February, Towne, Brown, Collins, and another fund employee named David Griffmore, flew to Florida for a golfing vacation at DPS expense. In January 1981, Brown entertained Collins at a resort in Phoenix, Arizona. Brown and Towne also offered Collins the prospect of future employment with them; Collins later took the offer and worked for Brown in an Arizona health care venture.

B. Things of Value Accepted by Fitzsimmons

From September to December 1979, Brown and Towne entertained Fitzsimmons at DPS expense. Some of the expenses were paid by Terry Porter, who in turn billed DPS. Fitzsimmons resigned his trustee position with the Fund on January 2, 1980 as a result of an unrelated conviction.

Beginning January 15, 1980, Porter began receiving monthly checks of $1,000 from CPS as commission payments for his role in obtaining the dental contract for Brown and Towne. From March 13, 1980 until June 19, 1981, Porter wrote checks in the amount of $400 made payable initially to Fitzsimmons and then to his wife. In return Porter received promissory notes reciting that Fitzsimmons would repay the principal amount plus ten percent interest within one year. The notes also granted Porter a lien on future commissions Fitzsimmons might earn while working for Porter. Fitzsimmons

however, was apparently in no financial position to be making loans. The loans were later written off by Porter's company, Terrence Porter & Associates. In addition to the payments by Porter, defendant Brown was once observed handing Mrs. Fitzsimmons a large amount of cash in an envelope.

On September 11, 1980, the Fund awarded DPS its third contract--this time for the establishment of a medical practice. In May 1981, Brown asked a real estate agent to look for suitable locations for medical clinic. He also asked the agent to hire Mrs. Fitzsimmons to assist in locating the sites. Towne gave the agent a series of $2,000 checks, and directed the agent to withdraw an identical sum from the agent's accounts and give it to Mrs. Fitzsimmons. Mrs. Fitzsimmons was not a qualified real estate agent and did no substantial work to earn the money.

C. Things of Value Adopted by Dorfman and Schwartz

When the DPS dental contract was proposed to the Fund, Dorfman's and Schwartz's phones were being tapped pursuant to an unrelated criminal investigation. In various conversations in November 1979, Dorfman pressed Schwartz to explain how Brown secured contracts with the Fund. Dorfman worried that Brown could not be trusted and that Collins might become too independent of Dorfman's and Schwartz's influence. Dorfman and Schwartz also discussed the possibility of receiving a "marketing fee" from Brown.

On December 20, 1979, shortly before approval of the optical contract, Dorfman and Schwartz met with Brown; their conversation was surreptitiously recorded. Schwartz demanded "some kind of proprietary interest" from Brown. Brown agreed to have Schwartz's company, FCS, handle his computer needs and to pay a percentage of the Fund's

fee to Dorfman and Schwartz. Brown also indicated a willingness to set up a partnership in which Schwartz and Dorfman would receive fifty percent of DPS's commission. During the meeting, Brown tendered checks to Schwartz and Dorfman but they refused them since the checks were made payable to FCS. Schwartz recommended that they set up a company to receive the checks and told Brown they would give him a proper designation for the checks at a later time. There is no evidence to suggest that Dorfman and Schwartz ever accepted any of these checks but Brown continued to set aside funds for this purpose.

After Brown left the meeting, Schwartz and Dorfman discussed the "staggering" amount of money to be made and how to shelter it. Schwartz noted that there "won't be enough hours . . . or enough places to hide the money." They considered opening a bank account in Switzerland and setting up a corporation in the Bahamas. Schwartz

concluded that "there's nobody . . . that knows we're involved in any kind of commission rigging. . . . Bobby [Holmes, a trustee], Chuck [Collins]--nobody."

D. The Fund's Relationship with Brown and Towne Deteriorates

Utilization of the medical clinics was low and the Fund lost $4,650,00 in 1980. By the spring of 1981, the Fund had disbursed $2,800,00 on the medical contract but only twenty-nine percent of the sum could be shown to have been utilized by union members. Responding to criticism, Brown and Towne proposed to underwrite the Fund's entire package of medical benefits, but the trustees rejected the plan on the advice of their actuary. Brown sought Dorfman's and Schwartz's assistance. Together, Brown, Schwartz, and Dorfman presented a proposal to administer all of the Fund's health care benefits for six percent of the total amount of health care claims paid, under a company named Direct Benefit Administrators, Inc.

The proposal was later rejected by the trustees on the advice of the actuary, who proposed that Blue Cross administer the hospital claims for 3.2% of the claims. The trustees adopted the recommendation deducting the Blue Cross fee from the current 6% administrative fee charged by DPS. Brown, Towne, Dorfman and Schwartz eventually acceded to this proposal. The contractual relationship between DPS and the Fund ended in 1982.

While Fitzsimmons was incarcerated, Brown and Towne proposed to hire Fitzsimmons as a marketing consultant upon his release and had business cards made for him but Fitzsimmons' attorney later determined that his conviction barred such employment.

In June 1983, Collins testified before a grand jury and falsely denied that Schwartz and Dorfman had any role in obtaining the dental contract for DPS. Two separate grand juries were convened to consider the evidence. On December 21, 1984,

a grand jury in the Eastern District of Michigan returned an indictment charging defendants with RICO and ERISA violations.

Trial commenced in January 1986, and lasted nine months. Collins was convicted on all counts. Fitzsimmons was convicted of Counts 1, 2, and 5 but, in a post-trial motion, the court arrested judgment on Counts 1 and 5. Schwartz was convicted on Count 2. Towne was convicted on Counts 2 and 3, but the court arrested judgment on Count 3. After filing a notice of appeal in March 1987, the appellants learned of a surreptitiously recorded conversation between defendant Fitzsimmons and a government informant which they believed to contain exculpatory material. They filed a motion for remand, which was granted, and obtained an evidentiary hearing in the district court in January 1989. Upon entry of the trial court's order denying defendants' new trial motions, defendants appealed.

II.

A. Prosecutorial Misconduct

Defendants face a high burden in seeking to reverse a conviction because of prosecutorial conduct. Unless the alleged misconduct "so infected the trial with unfairness as to make the resulting conviction a denial of due proces," an appellate court will not reverse the conviction. **Darden** v **Wainwright**, 477 US 168, 181 (1986) (quoting **Donnelly** v **DeChristoforo**, 416 US 637 (1974)). In habeas cases, this court has employed a four-factor analysis to determine whether conduct is so egregious as to render the trial fundamentally unfair. We consider (1) the degree to which the conduct complained of has a tendency to mislead the jury and prejudice the accused; (2) whether the conduct is isolated or extensive; (3) whether the conduct was deliberate or accident; and (4) the strength of the competent proof against the accused. **Angel** v **Overberg**, 682 F2d 605, 608 (6th Cir 1982) (en

banc) (quoting **United States** v **Leon**, 534 F2d 667, 679 (6th Cir 1976)). On direct review, where the court may exercise its supervisory power to rectify trial errors even in the absence of fundamental unfairness, prosecutorial misconduct will not commonly result in reversible error where the misconduct was not flagrant or where the proof of guilt is overwhelming. **United States** v **Bess**, 593 F2d 749, 757 (6th Cir 1979). Fed. R. Crim. P. 52(a) harmless error analysis applies to the court's exercise of its supervisory powers. **Bank of Nova Scotia** v **United States**, 487 US 250, 254-57 (1988) (district court should not dismiss an indictment for nonconstitutional error absent a showing of prejudice).

Defendants contend that the following incidents amount to prosecutorial misconduct:

1. **Incidents Before the Grand Jury**

Incident 1: A grand juror sked prosecutor Corbett whether a "closed nnel" dental plan was illegal. Corbett plied that it was not illegal, but stated at he expected the witnesses to testify at DPS overcharged the Fund for substantial ounts in connection with the plan. The and juror asked whether the investigation s related to the "mafia"or"organized ime." Corbett replied "Not directly," but ded that the name of Allen Dorfman had isen in the investigation and that Dorfman as a number of known associates that (have) st names end(ing) in vowels." The juror so wanted to know about the size of the eration. Corbett replied that it was a ery sophisticated financially well ganized operation."

Incidents 2 & 3: Prosecutor wcomer told the jurors that John Griffmore, Fund employee under Collins who had been on

the golfing vacation with Collins and Brown, might be uncooperative before he testified. Griffmore testified extensively and then left the stand momentarily while prosecutor Newcomer asked the jurors whether they had any questions for Griffmore. A grand juror expressed his view that Griffmore's testimony had been exhaustive. Another grand juror asked if Griffmore "knows anything?" Newcomer replied, "Yeah, you can judge that. I don't think we're going to get any more out of him. I think we got as much as we're going to get." Newcomer then received permission to excuse the witness.

With regard to another witness, Patricia Kenny, prosecutor Newcomer stated that she "could be [telling] the truth but I intend to put her under oath and at least ask her these questions." Kenny was a romantic interest of Collins after Collins' relationship with Lesa Young ended.

Incident 4: Prosecutor Newcomer made two references to Mr.

iacalone, a well-known Detroit area Mafia igure. The first was in questioning John olmes, Collins predecessor as executive irector of the Fund. The second instance ccurred seven months prior to Holmes' testi- ony.

Incident 5: Defendants harge the prosecutors with an "offensive nti-Semitic bias" arising from the use of he word Rabbi in the following question put Trustee Ward: "Is that correct, that you ere as concerned about Ed Brown having as s Rabbi or as his mentor someone who was oing to give him influence, Dorfman and chwartz, you were concerned about that?"

Incidents before the and jury do not affect the lameness of the ial. Therefore, this circuit applies a rict standard for dismissal of an dictment because of alleged prosecutorial sconduct before the grand jury. In order prevail on their claim, defendants must monstrate that "prosecutorial misconduct is

a long-standing or common problem in grand jury proceedings in the district." **United States** v **Azad**, 809 F2d 291, 294 (6th Cir 1986), cert. denied, **Bigley** v **United States**, 481 US 1004 (1987).

Defendants claim that prosecutors Newcomer and Corbett "testified" before the grand jury and improperly characterized witnesses' testimony. However, this argument is without merit. The prosecutors did not purport to act like witnesses: each "merely [gave] the grand jurors a preview of expected testimony and [did] not [act] as a witness himself." **Azad**, 809 F2d at 294. In response to questions from the jury, it is appropriate for the prosecutor "to refer to the anticipated testimony and its expected source." Although prosecutors should not generally comment on the veracity of witnesses before the grand jury, Newcomer's comment that "she could be telling the truth" was oblique, and the instance was isolated.

The "friends whose names end in a vowel" comment was unnecessary but made in response to a specific question from a juror regarding Mafia involvement. The two references to Giacalone were also isolated. Although they concerned an investigation unrelated to this one, the prosecutor mentioned the name for the purpose of jogging the witnesses' memories. Over the course of a grand jury which lasted many months, three allusions to possible organized crime connections are insufficient to prove prosecutorial misconduct.

Although some of the prosecutors' comments were unnecessary, they were inconsequential and incapable of seriously influencing the proceedings. Moreover, defendants do not even allege that prosecutorial misconduct has been a "long-standing or common problem" in the Eastern District of Michigan.

2. **Mistreatment of Witnesses**

Defendants charge the government prosecutors with intimidating three witnesses in an attempt to influence their testimony. The only appropriate remedy, they suggest, is either dismissal of the indictment or a new trial.

a. Lesa Young

Lesa Young was Collins' girlfriend and was allegedly put on the DPS payroll by Brown so that she could monitor Collins and prevent him from disclosing his relationship with DPS. She provided critical testimony because both men confided in her and because she was present on many occasions when Brown entertained Collins. She was reluctant to testify she said, because she had changed her life and was afraid the news media would publicize her involvement.

Several days before Young was to testify, the government left a message on her answering machine. The next day, the government left a message at her place of

employment, but she did not acknowledge either call. As she left work that day, she was approached by FBI agents. She fled in her car at a high rate of speed and, during the pursuit, the agents pounded on her car window while they were stopped at a traffic light. She headed toward Canada until her path was blocked on the Detroit side of the border. The agents told her that there was a warrant for her arrest; they then handcuffed her and drove her to FBI headquarters. Eventually, the agents told her that she was not under arrest. She was detained while the prosecutors debated whether to have her brought in front of a judge and acknowledge that she would come to court and testify. Instead, the agents handed her a new subpoena and allowed her to leave.

At the time Young was stopped, the government had already requested and been denied a material witness warrant by Judge Freeman, the trial judge assigned to this case. An hour after Ms. Young's arrest,

the government obtained a warrant from the presiding district judge. The judge was not familiar with the case and had not been told that Judge Freeman had earlier denied a warrant.

At trial, Schwartz's defense attorney moved to strike her testimony on the grounds that the government's mistreatment of Young "insulted the integrity of the court" and prejudiced the defendants. The court denied the motion. Outside of the presence of the jury, defense counsel was permitted to question Young extensively about the incident and her treatment by the FBI. She testified that she had intended to cooperate all along, that she did not discuss her testimony with the government the day she was arrested, and that her testimony did not change as a result of the incident.

Defendant Collins claims that Young changed her testimony as a result of the government intimidation. At trial,

Young testified that Brown paid Collins certain consulting fees while Collins was the executive director of the Fund. In earlier testimony, Young had not mentioned this fact. In front of the jury, Collins attorney questioned Young about her new disclosure. She stated that she had not mentioned it before because she did not think the receipt of consulting fees was illegal, and no one had asked her.

While the government's conduct in its treatment of Ms. Young is not laudable, Collins is the only defendant who even makes a claim of prejudice. In all but one respect Young's testimony before her apprehension matched her testimony given afterwards. Young's testimony at trial belies Collins' assertion that Young's new testimony was a direct result of government intimidation. Young stated that, although she

was somewhat intimidated by the government tactics, she did not change her testimony

in any respect. On the day of the incident, she did not even discuss her testimony with the government. The sole purpose of the government's tactic was to ensure her presence at trial. On cross-examination, Young stated that she had not mentioned the consulting fees before trial because she did not think the receipt of consulting fees was illegal. Collins' attorney had adequate opportunity to impeach her testimony in front of the jury based upon the omission of the new testimony in her previous statements. In sum, there are insufficient grounds to believe that the government's misconduct resulted in any prejudice to defendant Collins.

b. Linda Riffle and Marjorie Thomas

Linda Riffle had been employed in an administrative capacity for one of defendant Towne's companies and later for CPS. She testified on April 23, 1986, and at the end of the day was interviewed for

an hour and one-half by government prosecutors. She then went to the offices of defense counsel for an interview, and apparently stated that the government had been very unpleasant with her and that there were several inaccuracies in the government reports of her previous interviews. After a one-week recess, she returns to the stand on May 5, completed her direct examination and underwent cross-examination. The next day, she advised the court that she was too upset to continue her testimony and needed medication. She was excused for the day. She resumed cross-examination on May 9. At the close of cross, she accused defendant Porter and his counsel of making faces at her. At another point in the trial, her husband was removed from the courtroom after making an indecent remark to defendant Towne.

After Marjorie Thomas finished testifying for the day, both the prosecution and defense counsel requested to speak with her. She spent several hours

talking with the government prosecutors and at 4:39 p.m. left a message on defense counsel's answering machine that she was "still tied up." She returned to her hotel room at 6:00 p.m. after she finished with the government. Defense counsel called her at 9:00 p.m. She told him that she had been at the government's office until 6:00 p.m. and was too tired to speak with them.

Defendants first contend that the government "manipulated Ms. Riffle by extending its preparation of her until she was emotionally and physically exhausted, as well as by intimidating her. . . ." They argue that the purpose of this manipulation was to prevent defendants from interviewing Ms. Riffle. Defendants also assert that the government prevented Ms. Thomas from talking to defense counsel by extending its interview with her."

Ih the context of a nine-month trial with hundreds of witnesses, both incidents seem rather trivial.

Nonetheless, defendants maintain that the government manipulated Riffle into an emotionally exhausted condition causing her to be hostile to the defense, and delayed Thomas to prevent her from talking with the defense. Understandably, Riffle was probably tired from a day-long direct examination on April 23, 1986, and resented having to attend interviews that same evening, first with the government and later with defense counsel. There is simply no factual basis, however, to support the claim that the government manipulated Riffle or that her hostility to the defense was caused by the government. Beyond a blanket claim of hostility to the defense, defendants fail to allege any specific prejudice. Similarly, the incident involving Thomas fails to evince either governmental misconduct or prejudice.

3. **Deliberate Disregard for Court Orders**

a. Allegedly Discoverable Letters and Statements

Prior to trial, defendants filed a motion to dismiss the indictment on the ground that the government suppressed material discoverable under **Brady** v **Maryland**, 373 US 83 (1963). Defendants admit that they were given these materials prior to trial and therefore no **Brady** violation occurred. Nonetheless, they assert that the government's attempt to suppress these materials is prosecutorial misconduct. They also contend that although the government gave them the materials a full month before trial, it was not in sufficient time to prevent their case from being prejudiced. They ask this court to find a violation of due process for prosecutorial misconduct, though they acknowledge no **Brady** violation occurred.

Because defendants fail to specifically state how they were prejudiced by the alleged suppression or why a month was insufficient time in which to review these materials, we must conclude that

ney were not prejudiced by the government's
onduct.

b. FBI Agent Kelly Called to the Stand

At a pretrial hearing, he district court declined to rule as to the dmissibility of certain coconspirator tatements about which Agent Kelly was lanning to testify. Apparently, there was ome doubt as to whether they were made in urtherance of the conspiracy. The court dvised prosecutor Newcomer not to refer to he evidence until a final ruling had been ade. At trial Newcomer apparently forgot he matter was outstanding and called Kelly o the stand. Defense counsel whispered to ewcomer that this involved the challenged vidence. Newcomer acknowledged the matter nd told the court that an outstanding legal ssue had been brought to his attention. The y ended and the jury was dismissed. The ourt excluded the evidence the next morning

dismissed Kelly from the stand and gave a curative instruction even though Kelly never testified. Defense counsel alleges that this incident shows prosecutorial misconduct and claims the jury was left with the impression that evidence was kept from them. Again, however, we fail to see any prosecutorial misconduct. Prosecutor Newcomer simply forgot about the outstanding ruling. It was called to his attention before any evidence was elicited, and the court gave a curative instruction. Ultimately, the court reversed its ruling and admitted Kelly's testimony anyway.

c. Inadmissible Evidence

Defendants cite two instances where the government posed certain questions to witnesses and the defense counsel objected. In one, a heated exchange ensued and the government withdrew the question (FBI Agent Simpson was asked to interpret a taped conversation). In the second (Judith Burke was questioned about

rown's relationship with Mrs. Fitzsimmons), he court held a bench conference and then ave the government a little leeway on elevancy. On redirect, the government asked nother question pertaining to the matter, he defense objected, and the court sustained he objection. Neither instance lends itself o a finding of prosecutorial misconduct and gain no prejudice has been demonstrated.

d. Alleged Misrepresentations to the Court

Two of the alleged isrepresentations are inconsequential. In he first, defendants claim the government isrepresented the qualifications of an xpert witness, stating that he had been reviously qualified as an expert in federal ourt when in fact he had only given estimony in a deposition. The district ourt excluded the witness' testimony; hence, o prejudice resulted.

The second alleged misrepresentation occurred when the court revised its scheduling after the government advised the court that its witness (Max Kunis) had heart problems. In fact the witness' heart problems were ten years old and the witness wanted to revise the court's schedule because of his business concerns. Here, the witness was responsible for the misrepresentation, not the government and again no prejudice resulted.

The next incident was the subject of a lengthy post-trial evidentiary hearing and a twenty-six page opinion issued by Judge Freeman. In short, the Justice Department arranged for an informant to talk with Fitzsimmons while he was in jail regarding a criminal investigation unrelated to this case. The FBI specifically told the informant not to engage Fitzsimmons in a discussion about this case, and to steer the conversation away from this case if it was mentioned. The informant ignored the

instructions, encouraging Fitzsimmons to get rid of his lawyer and make a deal with the government. None of the taped conversation was used at trial. Instead the government sought a protective order barring disclosure of the recording in order to protect the identity of the informant. The court granted the protective order relying upon an offer of proof which was later discovered to have contained false statements. For example, the offer of proof stated that Fitzsimmons was a target of a nationwide labor racketeering investigation. In reality, he was only being investigated in connection with a local investigation concerning his operation of an airport limousine service. Defendants maintain that making these fake statements in the offer of proof is another example of prosecutorial misconduct.

In its post-trial opinion denying relief, the district court found that, although the government's offer of proof contained several false statement, the

sealing of the taped conversation was nonetheless proper in order to protect the identity of the informant. Apparently, neither prosecutor Newcomer nor prosecutor Corbett knew their statements were false when they made them. The alleged misrepresentations in the offer of proof were of no consequence since the evidence never reached the jury. Defendants, therefore, suffered no prejudice.

e. Alleged Misuse of Subpoenas

Defendants charge the government with misusing the subpoena power by using trial subpoenas to interview several Californians for the purpose of preparation for trial. One of the subpoenas was issued shortly before trial, the other three were issued during the trial but the witnesses did not testify. Of the three who did not testify, one traveled to Michigan and was interviewed by prosecutors but not put on the stand. The other two did not make the trip.

Defendant made no contemporaneous objection when the subpoenas were requested or issued. They also fail to point out how any prejudice resulted.

4. **Summary**

Defendants have recited numerous incident in the apparent hope that through the sheer number presented, this court would find that the cumulative effect of these errors deprived them of a fair trial. However, most of the incidents cited do not amount to misconduct, and none of the incidents resulted in prejudice to defendants' causes.

B. **Admission of Coconspirator Hearsay Statements**

Defendant Schwartz contends that the trial court erred by refusing to grant a mistrial when it ruled that certain hearsay testimony had been improperly admitted into evidence. The government's case included the testimony of Judith Burke and Lesa Young, and

two letters from Brown and Towne to Allen Dorfman. Burke, an employee and companion of Brown, testified that Brown told her that Schwartz was lending assistance in obtaining additional Teamster contracts in Oakland, California and in other areas. Brown also told her that Schwartz would have a proprietary interest in DPS's business in California. Brown indicated that Dorfman and Schwartz were partners and that Dorfman's approval was needed to do business with the Teamsters. Lesa Young testified that, according to Collins, Dorfman had been a key person in obtaining contracts for Brown. Young did not however, mention Schwartz in that portion of her testimony; she speaks only of Dorfman.

In addition to Burke's testimony, the government introduced two exhibits: two letters from Brown and Towne to Dorfman detailing the marketing fees, computer service fees and proprietary interest that Dorfman and Schwartz were to receive in the

proposed financial relationship. Marjorie Thomas, Brown's secretary, testified that, although drafted, the letters were never sent.

The district court first admitted the evidence subject to the procedure prescribed in **United States** v **Vinson**, 606 F2d 149 (6th Cir 1979), cert. denied, 444 US 1074 (1980). **Vinson** allows the government to admit coconspirator hearsay statements subject to the government's later demonstration by a preponderance of the evidence that: (1) a conspiracy existed; (2) defendant was a participant in the conspiracy; and (3) the statements admitted were made in the course of and in furtherance of the conspiracy. Id. at 153.

After the hearsay statements were admitted, the district court found by a preponderance of the evidence that a conspiracy existed and that Schwartz was a participant. However, the court concluded that the statements and exhibits were not

made in furtherance of the conspiracy. Therefore, the court struck the evidence from the record. The court offered a cautionary instruction to defendant Schwartz but Schwartz declined believing that the instruction would only highlight the evidence in the mind of the jurors and that the only effective remedy would be to declare a mistrial as to him. In his closing instruction, the trial judge admonished the jury not to consider stricken testimony or exhibits.

Although this is a borderline case, we must grant a new trial to defendant Schwartz because the stricken testimony significantly prejudiced his trial. As we noted in **Vinson**, "[i]f the court finds that the government has failed to carry its burden [as to proving that the hearsay evidence was in (furtherance of the conspiracy], it should, on defendant's motion declare a mistrial unless convinced that a cautionary jury instruction would shield the defendant

from prejudice." **Vinson**, 606 F2d at 153. In this case, we are not convinced that the cautionary instruction offered by the district court judge would have been sufficient to shield defendant from prejudice; nor did the closing charge admonishing the jury to disregard stricken testimony adequately protect defendant Schwartz.

In reaching this conclusion we are aware of the general proposition that

> [w]e normally presume that a jury will follow an instruction to disregard inadmissible evidence inadvertently presented to it, unless there is an "overwhelming probability" that the jury will be unable to follow the court's instructions, . . . and a strong likelihood that the effect of the evidence would be "devastating" to the defendant.

Greer v **Miller**, 483 US 756, 766 n.8 (1987) (citations omitted). Although the hearsay testimony stricken by the district court may not have been the most damaging evidence

against Schwartz, the erroneously admitted evidence so reinforced the other evidence against Schwartz that there is an "overwhelming probability" that the stricken evidence influenced the jury to conclude that Schwartz was guilty of conspiracy.

C. Fitzsimmons, The Sixth Amendment Violation, and Brady Material

Defendant Fitzsimmons argues that the government violated his right to counsel by having a government informant record his conversations with the informant when the government knew Fitzsimmons was under indictment and had hired a lawyer.

Lenny Schultz, a government informant approached the government offering to elicit information from Fitzsimmons in return for a plea agreement on drug charges. The Justice Department was then investigating Fitzsimmons in connection with a nationwide labor racketeering investigation. The government told the informant not to discuss any matter pertaining to the instant case,

and instructed him to keep the conversation away from this case. Schultz ignored the instructions, however, discussed the facts of this case, and advised Fitzsimmons to forget about his attorney and to strike a deal with the government. Neither Newcomer nor Corbett, the prosecutors in this case, were consulted prior to this incident. They first learned of the incident after it had already occurred. Newcomer reviewed the transcript and decided to use it only for impeachment purposes if Fitzsimmons took the stand. He then sought a protective order to prevent disclosure of the transcript in order to protect Schultz's identity. The district court granted the protective order and found that it contained no **Brady** material.

After the trial ended in this case, Schultz was brought to trial on the drug charges and his identity was revealed. Prosecutor Newcomer moved the court to remove the protective order in this case and delivered a copy of the transcript to

defendants. Fitzsimmons then filed a motion for a new trial alleging that his Sixth Amendment rights had been violated, and that the transcript contained **Brady** material, the suppression of which violated due process. The trial court issued an opinion concluding that although Fitzsimmons' Sixth Amendment rights were violated, he suffered no prejudice since the material had not been introduced against him at trial, did not contain any information related to defense strategies or communication subject to the attorney-client privilege, and did not contain any information that the government did not otherwise have.

Fitzsimmons argues that a showing of actual prejudice is not necessary and that prejudice should be presumed, citing **United States** v **Levy**, 577 F2d 200 (3d Cir 1978), and **Briggs** v **Goodwin**, 698 F2d 486, 493-94 (D.C. Cir 1983). In both **Levy** and **Briggs**, the court presumed prejudice because the government informant was privy to

nversations between defendant and his
torney and disclosed some of that
formation to the government. The **Levy**
urt held that prejudice is presumed "at the
int where attorney-client confidences are
tually disclosed to the government
forcement agencies responsible for
vestigating and prosecuting the case,"
vy, 577 F2d at 209; the defendant need not
ow the information was actually used by the
osecutors or of benefit to them.

Levy and **Briggs**, however, have no
plication to the facts of this case.
hultz was not present at any
torney-client meetings. Schultz and
tzsimmons did not discuss attorney-client
mmunications or defense matters other than
hultz having disparaged Fitzsimmons'
torney and urged him to plea bargain.
ven where there is an intentional intrusion
the government into the attorney-client
lationship, prejudice to the defendant must
shown before any remedy is granted."

United States v **Steele**, 727 F2d 580, 586 (6th Cir 1984) (citing **United States** v **Morrison**, 449 US 361 (1981), and **Weatherford** v **Bursey**, 429 US 545 (1977), cert. denied, **Scarborough** v **United States**, 467 US 1209 (1984). A review of the transcript confirms the district court's conclusion that no attorney-client communication information or defense strategies were revealed; hence, defendant Fitzsimmons suffered no prejudice.

As to the **Brady** issue, Fitzsimmons must show that "there is a reasonable probability that had the evidence been disclosed to the defense, the result of the proceeding would have been different." **United States** v **Bagley**, 473 US 667, 682 (1985). We concur with the district court that very little information in the transcript has exculpatory value. In his conversation with Schultz, Fitzsimmons merely denied the charges against him. He admitted that he and his wife accepted money, but claimed that it was bona fide compensation.

e expressed disbelief that his actions onstituted crimes, or that he could have nfluenced the Fund after he resigned. He lso stated that the dental plan would save he Fund money. While the statements may ave had some exculpatory value--for example, s bearing on whether he believed he was part f a larger enterprise to defraud the Fund -the evidence, had it been disclosed to the efense, would not have changed the result. ost of the statements are largely elf-serving expressions of surprise that his ctions were illegal.

D. Brady Material as To Defendants Schwartz and Towne

In separate assignments of error, chwartz and Towne allege that the onversation between Fitzsimmons and Schultz ontained exculpatory evidence entitling them o a new trial under **Brady**. The district ourt rejected both their claims in its emorandum opinion, finding no **Brady** material n the conversation. Like Fitzsimmons,

Schwartz and Towne must show that "there is a reasonable probability that had the evidence been disclosed to the defense, the result of the proceeding would have been different." **Bagley**, 473 US at 682.

The only notable reference to Schwartz in the conversation was shortly after Schultz suggested that Fitzsimmons make a deal and asked him what "these guys" meant to him.

Fitzsimmons:	Lenny I don't know what . . . their deal is. I don't know nothing about Sol Schwartz.
Schultz:	Yeah. Who is he?
Fitzsimmons:	I don't . . . He was Allen Dorfman's partner.

Schwartz contends that this excerpt is "highly exculpatory" and tends to prove that Schwartz had nothing to do with the

alleged conspiracy. The district court disagreed, stating that although some of the conversation might have been "useful" to some of the defendants, it did not have a reasonable probability of affecting the outcome of the trial. With regard to Schwartz's contention, the court noted that Fitzsimmons' self-serving statement that he knew "nothing about" Schwartz contradicts more probative evidence. Schwartz routinely attended trustee meetings when Fitzsimmons was present and the taped conversations of Schwartz and Dorfman reveal that they were aware of Fitzsimmons' involvement. Even if Fitzsimmons did not know of Schwartz's involvement, "[it] is not necessary . . . for all the co-conspirators to know each other or to have worked together on all phases of the criminal enterprise." **United States** v **Winship**, 724 F2d 1116, 1122 (5th Cir 1984). However, interpreted, Fitzsimmons' comment was not significant. At best, Fitzsimmons' brief reference to Schwartz is ambiguous and,

therefore, its exculpatory value is slight. In light of the more probative tapes demonstrating Schwartz's involvement, there is not a reasonable probability that the material would have affected the outcome of the trial had it been available for use at trial.

Defendant Towne claims that the conversation also contained exculpatory **Brady** material as to him. The only notable references to Towne in the conversation are the following:

> Fitzsimmons: Back in June, July or August of 1979, I, I was under indictment, Roger Towne and Ed Brown came and was with Bobby, Bobby and I as trustees, we took them up north as far as the Seminar. We liked their pro', I

liked their program . . . It was this uh, cap, uh, capitulated program. And every insurance company in, in business today is doing it. . . . It was a hell of a program. . . . They, you know, they were taking all their . . . money.

* * *

I don't know what Ed Brown and Roger Towne did. . . . Hey, if I knew. . . . If I truthfully knew . . . I'd tell 'em but I don't know what . . . they're

> talkin'. They're talking about skimmin' a million dollars . . . a month . . . or somethin'. . . . Well, I don't know what they did.

Fitzsimmons also stated that Towne had put his wife to work, that she had received $11,000, and that "that goddamn thing, that's one count." He also stated that Towne had promised him $2,500 a month as a consultant because of his connections with labor. The exculpatory value of these statements is slight; rather, statements that Towne and Brown were "taking all their . . . money" tend to be incriminating. Although some of these statements could be interpreted as attempts to explain the dealings with Brown and Towne as bona fide, and others as expressions of ignorance about the alleged conspiracy, none could be said to be

exculpatory to the extent that there is a reasonable probability the outcome would have been different.

E. Whether the Indictment Adequately Alleges a RICO Enterprise

Here, appellants make three assertions: (1) Counts 1 and 2 fail to adequately allege an enterprise with an ascertainable and identifiable structure distinct from that inherent in the conduct of a pattern of racketeering; (2) The RICO counts are impermissibly vague in violation of the Sixth Amendment; and (3) according to the RICO definition of enterprise, an enterprise cannot consist of a 'group of legal entities' such as corporations.

The RICO statute defines an enterprise as including "any individual, partnership, corporation, association of other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 USC Section 1961(4). Counts 1 and 2 allege the enterprise to be

comprised of the following entities: the Fund, DPS, DNC, d/b/a CPS, NHC, Occumedics, MHHS, TPA, Federal Services, and Federal Computer.

In **United States** v **Turkette**, 452 US 576, 583 (1981), the Supreme Court noted that the pattern of racketeering activity element refers to a "series of criminal acts," while the enterprise element refers to an "ongoing organization" in which the "various associates function as a continuing unit." The Court recognized, however, that the same evidence which proves the enterprise may also suffice to prove the pattern of racketeering activity. Id.

Circuits have interpreted **Turkette** differently. In order to distinguish pattern from enterprise, several circuits have added a third requirement: the enterprise must be "separate and distinct" from the pattern of criminal acts. **United States** v **Bledsoe**, 674 F2d 647, 663-65 (8th Cir), cert. denied, **Phillips** v **United States**, 459 US 1040 (1982);

United States v **Riccobene**, 790 F2d 214, 223-24 (3d Cir), cert. denied, **Ciancaglini** v **United States**, 464 US 849 (1983). It must have "an ascertainable structure distinct from that inherent in the conduct of a pattern of racketeering activity." **Bledsoe**, 674 F2d at 665. In other words, the parties' association or enterprise must have some distinct character or structure apart from their joint participation in criminal activities, otherwise RICO simply punishes the commission of two of the specified "racketeering" crimes within ten years. Id. at 664. The Sixth Circuit, however, has specifically rejected "the position that there must be proof of an enterprise distinct from proof of a pattern of racketeering." **United States** v **Qaoud**, 777 F2d 1105, 1115 (6th Cir 1985), cert. denied, **Callanan** v **United States**, 475 US 1098 (1986).

Actually, in this case, the association-in-fact alleged in the indictment constitutes a separate RICO enterprise. The

group of corporations mentioned in the indictment associated for a number of purposes other than illegal activities. They associated for legitimate even though the relationships and associations between the entities were sometimes used for illegal personal gain. As corporations, they formed a distinct and separate structure apart from the pattern of criminal acts. **United States** v **Feldman**, 853 F2d 648, 660 (9th Cir 1988) ("The corporate entities had a legal existence separate from their participation in the racketeering, and the very existence of a corporation meets the requirement for a separate structure."), cert. denied, 109 S Ct 1164 (1989).

Defendants' second contention, that the indictment is impermissibly vague, is without merit. Counts 1 and 2 adequately apprise defendant of the charges against them and state all of the elements of the offense charged. See **Russell** v **United States**, 369 US 749, 763 (1962).

Defendants' third contention is that a group of corporations cannot be an association-in-fact within the meaning of section 1961(4). Section 1961(4) defines enterprise to include "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 USC Section 1961(4). Defendants maintain that a group of corporations cannot be a "group of individuals associated in fact" since corporations are not individuals. Such novel interpretations of section 1961(4), however, have been rejected as contrary to the word "includes," which indicates the list is not exhaustive or exclusive, and contrary to the congressional mandate to "liberally construe" the statute. See, e.g., **United States** v **Perholtz**, 842 F2d 343 (D.C. Cir), cert. denied, 488 US 821 (1988); **United States** v **Navarro-Ordas**, 770 F2d 959, 969 n.19 (11th Cir 1985) (group of corporations may

constitute association-in-fact), cert. denied, **Rodriguez** v **United States**, 475 US 1016 (1986).

> Appellants' reading of section 1961(4) would lead to the bizarre result that only criminals who failed to form corporate shells to aid their illicit schemes could be reached by RICO. This interpretation hardly accords with Congress' remedial purposes: to design RICO as a weapon against the sophisticated racketeer as well as (and perhaps more than) the artless.

Perholtz, 842 F2d at 353.

We agree with the decisions in **Perholtz** and **Navarro-Ordas**, and, therefore, hold that corporations can be "individuals associated in fact."

F. Reliance on Time-Barred Predicate Acts as Evidence of Defendants' Participation in RICO Conspiracy

Defendant Fitzsimmons was found guilty of Count 1 (substantive RICO), Count 2 (RICO conspiracy), and Count 5 (section 1954 receiving and soliciting things of value). Defendant Towne was found guilty of Counts 2 and 3 (section 1954 violations). Following the verdict, the court granted Fitzsimmons' and Towne's motion to arrest judgment on Counts 1 and 5 as to Fitzsimmons and Count 3 as to Towne. Fitzsimmons and Towne now challenge their conspiracy conviction under Count 2 contending that it is impossible to determine whether the jury relied on legally sufficient grounds when it convicted them of the conspiracy count. We will discuss the issue only with regard to

Fitzsimmons, since the analysis is similar for Towne.[3] The district court found the indictment insufficient to sustain Counts 1, 3, and 5 for the following reasons. To be convicted of a substantive RICO count, a defendant must have committed two predicate acts, at least one of which is within the five-year limitations period set forth in 18 USC Section 3282. **United States** v **Walsh**, 700 F2d 846, 851 (2d Cir), cert. denied, 464 US

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[3] Towne's arguments mirror Fitzsimmons' arguments. The analysis for Towne differs only slightly because he was acquitted of the substantive RICO offense. Like Fitzsimmons, however, he contends the jury instruction permitted the jury to rely on an act which is not an offense in convicting him of the conspiracy charge. The interpretation and effect of the jury instruction and the grant of Rule 34 arrest of judgment is central to both their assignments of error.

825 (1983). The indictment in this case was returned on December 21, 1984, so, for Fitzsimmons to be guilty of substantive RICO violations, at least one of his predicate acts must have been committed after December 21, 1979. Of the three predicate acts he is alleged to have committed only one could meet that requirement. The government alleges that from April 23, 1979 until January 2, 1980, Fitzsimmons received and solicited things of value to influence the operations of the Fund in violation of 18 USC Section 1954. This allegation is also the basis of the section 1954 offense charged in Count 5, and is substantially similar to the separate paragraphs and acts pleaded in the conspiracy count (Count 2). The illegal activities asserted in each of these counts end on January 2, 1980, because Fitzsimmons resigned his position as of that date; a person can commit a section 1954 violation only when he is an "administrator, trustee . . . or

employee" and accepts or solicits things of value. See 18 USC Section 1954.

The government admitted below that the allegations charge a continuing offense, that is, an offense which spans a period of time rather than a discrete act. When the period specified in the continuing offense spans the statute of limitations period, as in this case, the crime is not barred by the statute of limitations as long as the proscribed course of conduct continues into the limitation period. See **Toussie** v **United States**, 397 US 112 (1970). A continuing offense may be charged only in limited circumstances, however, since "the tension between the purpose of a statute of limitations and the continuing offense doctrine is apparent; the latter, for all practical purposes, extends the statute beyond its stated terms." Id. at 115. Whether a continuing offense can be charged depends upon whether Congress intended or contemplated the statutory offense as a

continuing one. A statute should not be interpreted as providing for a continuing offense "unless the explicit language of the substantive criminal statute compels such a conclusion or the nature of the crime involved is such that Congress must assuredly have intended that it be treated as a continuing one." Id.

In its pretrial order denying relief, the district court concluded that section 1954 could properly be charged as a continuing offense since section 1954 "is inherently capable of continuing over an extended period of time." Relying on the legislative history of the statute, the court reasoned that the complexity of kickback schemes necessarily entails a continuous pattern of activity, rather than a single, discrete act. In a post-trial opinion, however, the court reversed its position, holding that section 1954 cannot be charged as a continuing offense. As a result, the district court arrested judgment on Counts 3

and 5 since the section 1954 offenses alleged in them were pleaded as continuing offenses, and on Count 1 since the predicate act was alleged as a section 1954 continuing offense and it was Fitzsimmons' only predicate act within the necessary limitations period for the RICO substantive count. The government did not appeal this holding, so we do not address it.

At issue on appeal is the effect that the arrest of judgment of Counts 1, 3, and 5 have on Fitzsimmons' and Towne's conspiracy convictions under Count 2. Defendants claim that they are entitled to a new trial on Count 2 because the conspiracy jury instruction permitted the jury to find them guilty of conspiracy by relying on predicate acts which were not in themselves offenses. The court's jury instruction on the conspiracy charge stated:

> The government satisfies its burden [of proving participation in the conspiracy] if it proves, beyond a

> reasonable doubt, either that the defendant agreed to personally commit two acts of racketeering or that the defendant agreed that another would commit two acts of racketeering.

(Emphasis added.)[5] Fitzsimmons argues that the conspiracy conviction must be nullified because the jury could have relied on the invalid predicate act to convict him of conspiracy. The arrest of judgment, Fitzsimmons argues, essentially declares that

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[5] To be convicted of conspiracy to commit RICO, the defendant must have "agreed to join a racketeering enterprise and [have] agreed to the commission of any two of the various predicate acts charged in the indictment." **Callanan** v **United States**, 881 F2d 229 (6th Cir 1989) (citing **United States** v **Joseph**, 781 F2d 549, 554 (6th Cir 1986)), cert. denied, 110 S Ct 1816 (1990).

some of the predicate acts do not constitute offenses. The jury instructions, however, allowed the jury to convict him of conspiracy if it found he committed these acts, which, because they were pleaded as continuing offenses, do not state offenses and, therefore, cannot serve as a sufficient legal basis for the conspiracy conviction.

Defendant's argument is akin to stating the general proposition of law that a person cannot be convicted of conspiracy when the object of the conspiracy does not state an offense. In other words, Fitzsimmons cannot be convicted of conspiring to commit predicate acts when the predicate acts are themselves legally insufficient to state an offense. Focusing on the either/or nature of the jury instruction, he contends that the jury may have relied on legally insufficient acts to convict him of conspiracy. Fitzsimmons cites several cases holding that where a conspiracy conviction is based upon allegations that the object of the

conspiracy were violations of criminal statutes and one of the allegations fails to state an offense, the conspiracy charge and conviction are fatally defective. See **Stromberg** v **California**, 283 US 359, 367-68 (1931) (where there is doubt as to whether a conviction is predicated upon an impermissible ground, that doubt must be resolved in favor of the defendant and the conviction vacated); **Leary** v **United States**, 395 US 6, 31-32 (1969); **Chiarella** v **United States**, 445 US 222, 237 n.21 (1980); **Zant** v **Stephens**, 462 US 862 (1983); **Callanan** v **United States**, 881 F2d 229, 235 (6th Cir 1989), cert. denied, 110 S Ct 1816 (1990); **United States** v **Mandel**, 862 F2d 1067, 1074 (4th Cir 1988) (general verdict RICO conspiracy conviction must be reversed were it is impossible to determine what decision the jury made with respect to various valid and invalid predicate acts), cert. denied, 109 S Ct 3190 (1989).

91-55

Supreme Court, U.S.
FILED
JUL 5 1991
OFFICE OF THE CLERK

No. 87-1284/2038; 87-1286/2072

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

FRANCIS R. FITZSIMMONS and

ROGER TOWNE (Petitioners)

-vs-

UNITED STATES OF AMERICA (Respondent)

APPENDIX

VOLUME VIII

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The government maintains that Fitzsimmons need not have performed any predicate acts to be a participant in the conspiracy. See **United States** v **Tripp**, 782 F2d 38, 41 (6th Cir) (a RICO conspiracy does not require proof of any overt act or proof that any predicate act of racketeering was actually committed), cert. denied, 475 US 1128 (1986). Furthermore, the government asserts that even time-barred predicate acts, although insufficient to state offenses in themselves, can serve as the basis for finding that the defendant agreed to participate in a conspiracy. See **United States** v **Persico**, 832 F2d 705 (2d Cir 1987) (conspiracy convictions upheld even though the predicate acts of these defendants occurred more than five years prior to the date of the indictment), cert. denied, **Russo** v **United States**, 486 US 1022 (1988). The differing positions are due in part to differing characterizations of the effect of Fed. R. Crim. P. 34. Defendant

characterizes the ruling below as deeming the predicate acts non-offenses. Since the instruction permitted the jury to find a conspiracy if it found agreement to perform these "non-offenses," the conspiracy conviction, according to defendant must fail. The government offers a narrower characterization. Although the predicate acts are technically not offenses because they were time-barred (or more appropriately invalidly pleaded continuing offenses in an attempt to defeat the time-bar), they nonetheless are sufficient to demonstrate that defendant had agreed to participate in the joint objectives of the conspiracy by agreeing to perform two predicate acts. To the extent the jury relied on the actual acts alleged in those non-offenses, it relied on acts which were sufficient to demonstrate defendant's participation within the conspiracy. We agree with the latter characterization. Even though non-offenses, the acts alleged were sufficient to

demonstrate that Fitzsimmons agreed to commit two racketeering acts. By agreeing to commit those acts, Fitzsimmons entered into the conspiracy. The conspiracy, composed of multiple participants and having broad objectives beyond these particular acts, continued past December 21, 1979 and into the limitations period. Fitzsimmons did not withdraw from the conspiracy before such time, and can, therefore, be held accountable for its actions. Similarly, because Towne's alleged act in Count 3, even though a non-offense, could serve as a basis for finding he participated in the conspiracy, his conviction on Count 2 is also valid.

The jury instruction should not be interpreted as simply bootstrapping a conspiracy conviction onto a finding of the requisite elements of a substantive conviction. The jury is asked to determine whether the defendant "agreed to commit two racketeering acts." Assuming that the jury found that defendants agreed to commit these

acts, as Fitzsimmons and Towne ask us to do, it is the agreement to commit these acts, not the acts themselves, that is the basis of the conspiracy conviction.

G. Prosecutor's Rebuttal Comments

In his rebuttal, prosecutor Newcomer referred to the stricken coconspirator hearsay testimony provided by witness Judy Burke. Burke testified that she had overheard a conversation between Brown and Frank Fitzsimmons, Sr. (defendant Fitzsimmons' father) in which Fitzsimmons thanked Brown for "taking care of my son and his family in their time of need." Defendant Fitzsimmons claims that this statement, later stricken, constituted the only direct evidence that he personally (not including his wife) received anything of value after he left the Fund; all other evidence was circumstantial.

While attempting to demonstrate that Fitzsimmons received money after leaving office, prosecutor Newcomer stated that

"there's testimony that there were monthly contact between Mrs. Fitzsimmons and Mr. Brown for business purposes." Contrary to Newcomer's assertion, however, there was no testimony of monthly contacts between Brown and Fitzsimmons other than that contained in Burke's stricken testimony. Fitzsimmons' counsel objected to the rebuttal statements and moved for a mistrial. The court gave a curative charge instructing the jury to disregard testimony concerning Brown's visits to Mrs. Fitzsimmons and the reference made to it in rebuttal. The comment is not so prejudicial that a new trial is required; we can presume that a jury will follow the instruction to disregard the inadmissible evidence presented to it as well as the reference in rebuttal. See **Greer** v **Miller**, 483 US 756, 766 n.8 (1987).

Fitzsimmons also objects to Newcomer's comment that Fitzsimmons was an "ex -con." Newcomer was asking the jury to find that Fitzsimmons solicited the money he

and his wife received in 1980 and 1981 before he ever left the Fund in January 1980. The tacit agreement to accept money could have come even before he left the Fund, Newcomer argued, because Brown and Towne were aware that Fitzsimmons would be an influential union contact even after he was released from jail. In that context, Newcomer stated, "[b]y this time he's an ex-con who . . . may have union contacts, but severely damaged union contracts, unless that's a badge of courage within the Teamster's union which I can't believe."

Fitzsimmons charges that the reference was inflammatory and, along with the other indirect reference to Burke's testimony about Frank Fitzsimmons, Sr., was an attempt to portray this case as a "Teamsters case " The government responds that, although calling Fitzsimmons an ex-con might have been indelicate, it was neither false nor misleading. Presumably, it had been disclosed earlier in the trial that

Fitzsimmons had previously been convicted of a felony, and his conviction was the reason he had resigned as trustee of the Fund. Again, taking the comment in its context, it does not rise to the level of reversible error. The rebuttal itself lasted for approximately fifty pages of transcript. The isolated reference does not suggest that the jurors should convict Fitzsimmons because he had previously committed a felony, it only suggests that he had union contacts or influence, albeit damaged contacts, even as an ex-offender.

III.

For the foregoing reasons, we **reverse** the conviction of defendant Schwartz and confirm the convictions of defendants Collins, Fitzsimmons and Towne.

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, Appellee,	
v	Court of Appeals
CHARLES COLLINS (87-1283),	Nos. 87-1283/84/85/86
FRANCIS R. FITZSIMMONS (87-1284/2038),	87-2038/2072
SOL SCHWARTZ (87-1285) and	Lower Court
ROGER TOWNE (87-1286/2072),	No. 84-20715
Appellants.	

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PETITION FOR REHEARING, REHEARING EN BANC AND JOINDER IN PETITION FOR REHEARING AND REHEARING EN BANC FILED BY APPELLANTS FITZSIMMONS AND COLLINS

NOW COMES Appellant ROGER TOWNE, by his counsel, RICHARD PAUL ZIPSER, and petitions this Honorable Court for Rehearing and Rehearing En Banc and in compliance with and the Federal Rules of Appellate Procedure and the Rules of the Sixth Circuit of the United States Court of Appeals further states that:

A. I express a belief based on a reasoned and studied professional judgment that the Panel decision is contrary to the following decisions of the United States Court of Appeals for the Sixth Circuit or the United States Supreme Court and that the consideration by the full court is necessary to secure and maintain uniformity of decisions:

Steele v **Taylor**, 684 F2d 1193 (6th Cir 1982)

United States v **Popenas**, 780 F2d 545 (6th Cir 1985)

Brady v **Maryland**, 373 US 83 (1963)

United States v **Agurs**, 427 US 97 (1976)

United States v **Bagley**, 473 US 667 (1985)

B. RICHARD PAUL ZIPSER, counsel to Appellant, also expresses a belief, based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance:

1. a. Where the Government prosecutor engages in making, as this Panel has found, several false representations to the Trial Court; and

b. where such Government action was part of a deliberate ruse and continued subterfuge that resulted in a wrongfully obtained Ex Parte Protective

Order denying to the Appellant Towne the knowledge and content of a Government-made tape recording of the words of Co-Defendant Fitzsimmons to the Government's Agent-Informant that contained material evidence, exculpatory in nature and aided greatly in adequate preparation of Appellant Towne's strategy and central to Towne's bona fide defense; and

c. where additional considerations:

(1) that the Government had created the unavailability of this evidence; (2) opposing severance thereby further making Fitzsimmons' testimony unavailable while knowing of the existence and content of the tape recording; and (3) Government counsel admitted that the Government wanted the advantage of using the tape recording against Defendants for whatever purpose--does the above require a reversal of Towne's conviction because public policy protects the integrity of the

adversary process, deterring litigants (including the Government) from acting on improper incentives to knowingly make unavailable adverse testimony or evidence, on principles of reciprocity similar to the equitable doctrine of clean hands; and because the Government counsel misused the Trial Court and made false representations to the Trial Court to gain an improper Order effectively depriving use by Appellant Towne of important evidence.

2. Does the failure to produce the tape recording and the false manner and method of the Government in failing to produce the evidence (the tape of co-Defendant Fitzsimmons) require a reversal of Appellant Towne's conviction, where the jury had acquitted Towne of the RICO substantive offense but convicted him of a conspiracy to commit a RICO substantive offense; and does the analysis of the circumstances, including the jury being troubled, the actions of the Government, and

the failure to produce the evidence violate the Due Process clause and the decisions in Brady, Bagley, Agurs, and the tests enunciated by said case authority require reversal of Appellant Towne's conviction?

C. Counsel adopts the Statement and Petition filed by the Co-Defendants Fitzsimmons and Collins for Rehearing and Rehearing En Banc.

_____ _____

Date

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THE PETITION CONSIDERATIONS

This Court is asked to rehear, or to grant rehearing en banc, for the following additional reasons:

1. The failure to reverse the conviction of Towne rewards the Government for engaging in a ruse and lengthy subterfuge to avoid the providing of material evidence to the Appellant Towne. The Government sought a Protective Order from the Trial Court, where it is clear that such an Order was not appropriate and, moreover, was obtained by repeated false representations of the Government to the Trial Court. The Protective Order (effectively hiding the evidence from Appellant Towne) had been obtained from the Trial Court exclusively through the Government's offer of proof, which was later discovered to have contained false statements. (See page 16 of current Sixth Circuit Opinion filed February 26, 1991, hereinafter referred to as "Opinion.")

2. The Trial Court ruled in a st-trial opinion that, in fact, the vernment's offer of proof contained several lse statements. (See Opinion, page 16.) pellant Towne has argued that the failure disclose this recorded conversation and to ve the evidence and knowledge with the pellant prior to trial, or during trial, verely damages the Appellant Towne and did disservice to the inherent fairness within e conduct of the trial itself. Towne intains that as a result of the conduct of e Government in its suppression of culpatory evidence consistent with his nocence warrants reversal of his nviction.

3. The action of the Government the equivalent of activity frowned upon by e Sixth Circuit in **Steele** v **Taylor**, 684 F2d 93 (6th Cir 1982). There, the Sixth rcuit held that a prior statement, given by witness who is unavailable due to the ongful conduct of a party, is admissible

against the party if the statement would have been admissible had the witness testified. The rule is based on public policy protecting the integrity of the adversary process by deterring litigants from acting on strong incentives to knowingly make unavailable adverse testimony on a principle of reciprocity similar to the equitable doctrine of clean hands. This principle applies to the Government, as well as all other parties to litigation.

4. Further, in **Steele** v **Taylor**, the Court recounted that witnesses or individuals do not make statements which are damaging to themselves unless satisfied that they are true. 684 F2d 1204. The Court then permitted the unavailable declarant's statement to an Agent to be testified to by the Agent, as it fell within admissible evidence bases; and, importantly, because the party had made the declarant unavailable by the actions it had taken.

5. In the instant matter, the vernment made the secret tape recording of -Defendant Fitzsimmons unavailable ntaining important material-exculpatory idence as to Towne and inculpatory at times Fitzsimmons. It used a ruse to achieve e result by making multiple false atements to the Trial Court. As the matter w stands, the Government is being rewarded r having ostensibly hidden the evidence. pellant Towne is entitled to a reversal of s conviction.

6. The Government constructed the tigation. It proceeded by a joint dictment of the Defendant Towne with fendants Fitzsimmons, Schwartz, Collins and rter. It fought every Motion for Severance de by the Defendant Towne. Co-Defendant tzsimmons could not be brought to the stand a witness. He was a Co-Defendant with a ght to remain silent, and he asserted that ght. An unavailable declarant, tzsimmons went further and utilized his

marital relationship with Mrs. Fitzsimmons to provide a privileged circumstance where Mrs. Fitzsimmons could not be cross-examined or called by Appellant. Yet, during the entire time, the Government was secretly in possession of a transcript of statements made by Fitzsimmons to the Government's Agent and Informant that essentially contains the defense of Towne to the charge laid against him.

7. As the Panel or this Circuit rehears this issue, the gravamen of the only count of the Indictment Appellant Towne stands convicted essentially is that the Government had to prove the intent of Appellant Towne in giving the Fitzsimmonses something of value by providing Mrs. Fitzsimmons, the Appellant's wife, with money or things of value with a criminal purpose and intent, contrary to 18 USC 1954 [that said money was given because of the actions, decisions, and duties of Francis Fitzsimmons related to his ERISA function as a Trustee of

Michigan Conference of Teamsters Welfare
l, hereinafter referred to as "The Fund"].

8. The knowledge of the tape's
stence and its content would have aided
ne in the preparation of his case (i.e.,
e the stand, severance actions,
oenaing witnesses). Towne could have put
the central theme of the argument and
rt of his defense; namely, that his
ions were consistent with a bona fide
ose unrelated in time or in action to the
SA relationship of Fitzsimmons.

9. Focusing on reasonableness and
ability, the Government's actions
cluding the use of the hidden tape as
dence and preparation, including conduct
strategy at trial would under **Brady** v
yland test, 373 US 83 (1963) and **United**
tes v **Bagley** standard, 473 US 667, 682
5), compel this Honorable Court to find
had disclosure been made, it would fall
ain a reasonable probability of affecting
outcome of the trial as to Towne.

10. This Honorable Court is asked to read or reread pages 25-27 of the transcript of the tape recording in the instant matter. In doing so, have in mind **Brady** requirements of the disclosure of material.

11. Substantial portions of that taped transcript of May 1, 1985, were exculpatory to the Defendant Towne and inculpatory, in some respects, to the Co-Defendant Fitzsimmons. As to Appellant Towne, they were relevant, material, and probative on the issue of guilt or innocence--in fact, the very central issue--a bona fide purpose of Appellant Towne versus an illegal 1954 wilful violation of the law. Utilizing the **United States** v **Bagley** standard, evidence is considered material where there is reasonable probability that had the evidence been disclosed, the result of the proceedings would have been different.

12. The focal point of the allegations against Towne was the purpose of

giving money to the wife of Co-Defendant Fitzsimmons and that such purpose was related to Fitzsimmons actions as the Trustee of The Fund. Towne's counsel argued that Towne's purposes were consistent with innocence in attracting the Co-Defendant-Appellant Fitzsimmons to work at a later date and were entirely unassociated with his Trustee status of The Fund. A bona fide legal purpose, as opposed to the Government's argued criminal purpose was the defense of Towne.

13. The nondisclosure of the tape involves the consideration of the adverse effect of such action on the preparation or presentation of the Defendant's case including, but not limited to: (a) whether or not Towne would have testified at his trial; (b) whether or not Mrs. Fitzsimmons would have been able to be brought to the stand because the conversation's privilege and confidentiality may have been destroyed as a result of Mr. Fitzsimmons' conversation with the Informant; (c) Whether a severance

would have been granted to allow Towne to be tried apart from Fitzsimmons; and (d) to be able to put Fitzsimmons' taped words before the trier of fact. Further, the Appellant Towne is deprived of a fair trial under the standards set down in **United States** v **Agurs**, 427 US 97 (1976).

14. The Trial Court's post-trial opinion in this matter and the instant Opinion, appear to accept the evidence was admissible. The instant Opinion finds that "although some of these [statements on the tape of Fitzsimmons] could be interpreted as attempts to explain the dealings with Brown and Towne as bona fide, and others as expressions of ignorance about an alleged conspiracy. . ." none could be said to be exculpatory to the extent that there is a reasonable probability the outcome would have been different. (See page 23 of the instant Opinion.) (Brackets added.)

15. Certainly Towne would have offered the portion of the tape recording at

his trial to establish Towne's non-culpability and his bona fide purpose. The Trial Court's Memorandum Opinion is an implied acceptance that the taped conversation was admissible as residual hearsay and, indeed, a finding by the Court that the tape itself may have been useful to the Defendants. (See R 688, Memorandum Opinion, page 25.)

16. A review of the tape transcript establishes Fitzsimmons is commenting on the subject of Towne putting the Co-Defendant Fitzsimmons' wife to work in the job of looking for properties (real estate) and the receipt of some Eleven Thousand Dollars. Fitzsimmons states why the Eleven Thousand Dollars was provided to his wife. Fitzsimmons states he was not even working for the union at that time. Fitzsimmons is not an ERISA employee at the time of the alleged receipt. Fitzsimmons says that it was not accurate that it had something to do with the union. He went to

Roger Towne, who was interested in Fitzsimmons because of his connections with his father. They were worth a substantial amount of money in the future. This is said by Fitzsimmons as having taken place in December of 1981. This is well after Fitzsimmons had resigned as a trustee of The Fund!

17. When the Panel reached its decision concerning notable references to Towne, the Panel had already previously discussed that Fitzsimmons had said on the tape that he and his wife accepted money "but claimed that it was bona fide compensation." (See page 21 of the instant Opinion.)

18. Government's counsel, Newcomer, admitted that he wanted the flexibility to utilize the tape recorded statement in case Fitzsimmons took the stand; or to utilize the tape recorded statement for whatever purposes would be useful for him during the course of the trial. He did not want to preclude the ability of being unable

to use it at some time. (See New Trial Transcript, Volume IV, page 161, 163-164.)

19. The disadvantage to Towne is overwhelming. The statements made by Fitzsimmons on the tape help the Appellant Towne; i.e., (a) exculpatory evidence, (b) material evidence, (c) preparation as to defense, (d) determinations to be made as to whether Towne would take the stand, not take the stand, or the ability to confront or cross-examine other witnesses such as Mrs. Fitzsimmons; and (e) the ability to put Mr. Fitzsimmons words before the jury. The Government had reached its position by a ruse of making false representations to the Trial Court as to why the tape should not be disclosed. Under a **Steel** v **Taylor** doctrine, this is impermissible conduct and conduct that should have led to the admissibility and use of the statements by Towne. See also **United States** v **Puglisi**, 790 F2d 240 (2nd Cir 1986), where the Court condemns the type of structured trial and activity utilized by the

Government to keep out evidence that was relevant and material to Defendant Towne's defense.

20. The Government conceded during the Motion for New Trial in Volume IV, pages 150-151, that the tape recording was mildly inculpatory as to Fitzsimmons. The Government recognized that there was an issue as to a bona fide reason for giving things to Fitzsimmons. Government's counsel anticipated Appellant Towne's defense prior to the return of the Indictment. (See New Trial Transcript, Volume IV, page 155.)

21. This Court is asked to go back and review, or the Court is asked to hear en banc and consider the standards of Due Process enunciated in **Brady** and **Bagley**, **Supra**, and the reflection of the majority viewpoint in Justice Blackman's presentations. Legal scholars have looked at the **Bagley** analysis:

> Certainly if a judge believes that the non-disclosed evidence creates

a reasonable doubt he is likely to conclude that there is a reasonable probability that the outcome would have been different. Yet, where the case obviously troubled the jury, a judge arguably could also find a reasonable probability even though a reasonable doubt is not created in his mind. See **LaFave**, **Criminal Procedures**, Section 19.5 at page 54 (1989).

22. This most Honorable Court of Appeals is asked, again, to recall that the jury was definitely troubled. Towne was acquitted of the substantive RICO offense that contained allegations as predicate acts of giving things of value, contrary to the criminal purpose or the intent contained in 18 USC 1954. Defendant Schwartz was acquitted of the substantive RICO offense. Porter, when he put his bona fide reasons before the jury, was acquitted. Given the troublesome nature to the jury and the

obvious potential of compromised verdict, in the absence of this bona fide purpose in the evidence of the tape, it cannot be said that the evidence was not suggestive of a reasonable probability that the outcome would have been different.

23. In **United States** v **Popenas**, 780 F2d 545 (6th Cir 1985), Judge Martin ruled that the refusal to admit an Affidavit as substantive evidence in a tax evasion case constituted reversible error, even though the Affidavit was hearsay. The Affidavit indicated that falsehoods in taxpayer's returns were due to the affiant's incompetence and therefore was directly relevant to the issue of wilfulness, requiring the Trial Court to center on the viability of FRE 803(24). In **Popenas**, the only question at trial was whether **Popenas** had failed to report substantial amounts of income during the years 1977 to 1980 as a willful act required by the Statute.

24. The analysis in **Popenas** by udge Martin is helpful in looking at the nstant matter:

a. The statement must have ircumstantial guarantees of trustworthiness quivalent to those in the first twenty-three xceptions. Towne qualifies with regard to he sought-after tape recording. Fitzsimmons ives reasons for Towne's bona fide purpose nd Fitzsimmons makes inculpatory remarks as o himself. FRE 804(b)(3).

b. It is being offered as vidence of a material fact. It is more robative on the point for which it is ffered than any other evidence which could e secured through reasonable efforts. In he instant matter, the Government had endered it impossible to produce Mr. or Mrs. itzsimmons (joinder of all Co-Defendants). he Government had, through a ruse, made it mpossible for the Defendant to gain nowledge of the tape's content. The vidence is probative for the point on which

it was being offered; namely, the bona fide intent in the dealings of the Defendant Towne with the Fitzsimmonses.

c. That the admissibility should be consistent within the interests of justice.

d. There was no way anyone could give notice of intent to offer the statement, as the Government had "hidden" the statement from the Defendant.

25. The Appellant Towne has also argued that not only 803(24) was relevant, but its mirror image, FRE 804(b)(3), was also relevant in that the statement made by Fitzsimmons against the interests of Fitzsimmons made it all the more reliable and trustworthy evidence. FRE 804(b)(3) spends a great deal of its time discussing its underpinnings of reliability and trustworthiness.

26. The circumstances of the statement made by Fitzsimmons to the undercover Government Informant in private,

eking help--certainly not knowing he was
ing tape recorded--indicate trustworthiness
rcumstances. Relevant factors determine
e trustworthiness of the statement,
cluding the time of the declaration, the
rty to whom it was made, the existence of
rroborating evidence, the extent to which
e declaration is against the declarant's
nal interest, and the availability of the
clarant as a witness. Co-Defendant
tzsimmons was unavailable as a witness.
e instant Opinion said that Fitzsimmons'
atements tended to be incriminating as to
tzsimmons. (See page 23 of the February 26
inion. This is also fifth point of Martin,
Opinion in **Popenas**, **Supra**.)

27. The Government wanted Schultz
use tape recording. They wanted to have
rd, corroborating evidence of
nversations. Strike Force Attorney Corbet
ated they did not want to rely on Schultz's
rd alone. (See Motion for New Trial
anscript, Volume III, page 63.) The

statement was being made to an individual that had an agency relationship with the Federal Government as a confidential Informant. Schultz had been a confidential Informant since 1951 until January of 1985, and had over 200 contracts during the years 1979-1984, with the FBI. (See Motion for New Trial transcript, Volume I, pages 98-100.) The Government admitted the tape recording and the Motion for New Trial was mildly inculpatory as to Fitzsimmons. (See Motion for New Trial Transcript, Volume IV, pages 150-151.)

28. This Circuit needs to set down with clarity that the Government should not prevail through this ruse of making the evidence unavailable by false representations to the Court about the tape recording that would have assisted in the preparation and presentation--the central bona fide legal rationale for the Defendant Towne's conduct. If this case is anything, the facts set out, the circumstances for **Brady** and **Bagley**,

ora, protection. When a party behaves in a shion as consistent with the behavior tributed to a party hiding a witness in the xth Circuit, the case of **Steele** v **Taylor**, **ora** mandates reversal of Towne's nviction. Towne's conviction should be versed, as there is a rational and asonable probability that, had the evidence en disclosed to the defense, the result of e proceeding would have been different.

29. Additionally, a Sixth Circuit ling is needed with clarity that, when the vernment applies ex parte to a court to oid presenting useful pre-trial evidence to defendant and it turns out that the vernment made substantial false presentations to the court, the injury to e adversary process and the affront to the urt mandates that the conviction be versed to ensure a fair trial and prevent vernment misuse of the Trial Court in nying a fair trial.

This Court should grant rehearing and reverse or grant rehearing en banc; and, upon such hearing, reverse the conviction of Towne for the reasons stated.

Respectfully submitted,

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Dated: March 12, 1991.

NO. 87-1284/2038; 87-1286/2072

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	)	
Plaintiff-Appellee,	)	
v	)	ORDER
FRANCIS RICHARD FITZSIMMONS	)	
(87-1284/2038),	)	
ROGER TOWNE (87-1286/2072),	)	
Defendants-Appellants)		

BEFORE: JONES and NORRIS, Circuit Judges; and JARVIS*, United States District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

_____

Leonard Green, Clerk

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*Hon. James H. Jarvis sitting by designation from the Eastern District of Tennessee

Supreme Court, U.S.
FILED
SEP 6 1991
SEP 9 1991
OFFICE OF THE CLERK

No. 91-55

In the Supreme Court of the United States

OCTOBER TERM, 1991

FRANCIS R. FITZSIMMONS and ROGER TOWNE,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the statute of limitations bars a RICO conspiracy prosecution where the predicate acts described in the indictment occurred outside the limitations period, if the conspiracy itself continued into the limitations period.

2. Whether the Sixth Amendment requires reversal of petitioner Fitzsimmons' conviction because a government informant taped conversations with petitioner Fitzsimmons, even though the recording did not aid the prosecution.

3. Whether the Fifth Amendment requires reversal of petitioner Towne's conviction because the informant's recording was not released to Towne until after his trial.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 415-490) is unreported, but the judgment is noted at 927 F.2d 605 (Table). The opinions of the district court (Pet. App. 286-319, 320-340, and 341-402) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 26, 1991. A petition for rehearing was denied on April 22, 1991. Pet. App. 518. The petition for a writ of certiorari was filed on July 5, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Michigan, petitioners were convicted of conspiring to participate in an enterprise through a pattern of racketeering activity, in violation of the Racketeer-Influenced and Corrupt Organizations statute (RICO), 18 U.S.C. 1962(d). The district court sentenced petitioner Fitzsimmons to five years' imprisonment and fined him $5,000; it sentenced petitioner Towne to three years' imprisonment and fined him $20,000. The court of appeals affirmed. Pet. App. 415-490.

1. Petitioner Towne was a principal of Delaware Professional Services, Inc. (DPS). Petitioner Fitzsimmons was a trustee for the Michigan Conference of Teamsters Welfare Fund (the Fund). Starting in 1979, Towne and others gave money and other things of value to Fitzsimmons and other trustees to secure their assistance in causing the Fund to grant health-care delivery contracts to DPS. During the spring and summer of 1979, Towne gave free airline tickets to a trustee named Collins. From 1979 through 1981, Towne and his associates frequently purchased meals and drinks for Collins. Finally, they put Collins' girlfriend on their payroll and rented an apartment for Collins and her. With Collins' encouragement, the Fund accepted a DPS dental plan in May 1979 and an optical plan in early 1980. Collins subsequently left the fund and began working for one of Towne's associates. Pet. App. 420-423.

From September to December of 1979, Towne and his associates frequently entertained Fitzsimmons. In January 1980 Fitzsimmons resigned his trustee position because of an unrelated criminal conviction, but an associate of Towne's continued lending money to

Fitzsimmons in amounts inconsistent with his ability to pay; the "loans" were never repaid. Finally, in 1982, because the Fund was losing considerable sums of money on the medical plans purchased from DPS, the Fund terminated its relationship with the DPS medical plans. Pet. App. 424-429.

An indictment was returned on December 21, 1984, charging petitioners with substantive RICO violations (18 U.S.C. 1962(c)), RICO conspiracy (18 U.S.C. 1962(d)), and giving and accepting things of value as bribes to influence the Fund's decisionmaking (18 U.S.C. 1954). Pet. App. 1-69.

2. After the indictment had been returned and Fitzsimmons had retained an attorney, an informant named Lenny Schultz approached the Justice Department and offered to elicit information from Fitzsimmons in return for the government's agreement to enter into a favorable plea agreement regarding certain drug charges that were pending against him. Because Fitzsimmons then was a subject of a nationwide labor racketeering investigation, the Department agreed to his offer. Schultz ignored the instructions, discussed this case with Fitzsimmons, and urged him to strike a deal with the government. Pet. App. 458-459.

When the prosecutors involved in this case learned of the transcript of Schultz's conversations with Fitzsimmons, they decided to use it only for impeachment purposes and sought a protective order to prevent disclosure of the transcript, in order to protect Schultz's identity. The district court concluded that the transcript did "not contain exculpatory information within the meaning of *Brady* v. *Maryland*, 373 U.S. 83 (1963)," and entered a protective order allowing the government not to disclose the transcript to petitioners. Pet. App. 99-101, 459.

3. Before trial, petitioners sought dismissal of the indictment, arguing that the prosecution was barred by the five-year statute of limitations set forth in 18 U.S.C. 3282. The district court initially concluded that none of the counts of the indictment were barred. Pet. App. 298-319. After trial, however, the district court reversed its ruling with regard to the substantive offenses and granted petitioners' motions for arrest of judgment with respect to the substantive RICO charges and the Section 1954 charges, concluding that those statutes require the government to prove discrete criminal acts within the limitations period. *Id.* at 338-339. With respect to the RICO conspiracy charge, however, the district court adhered to its earlier opinion and thus denied petitioners' motions for arrest of judgment. *Id.* at 339-340; see *id.* at 308-318.

4. Some time after the trial, informant Schultz was tried and his identity revealed. Accordingly, the government had the protective order lifted and delivered a copy of the transcript to petitioners. Petitioners then filed a motion for a new trial. Fitzsimmons contended that the government had violated his Sixth Amendment rights by taping the conversations, and both petitioners argued that the government's failure to release the transcript before trial violated the Fifth Amendment.

The district court disagreed. As for the Sixth Amendment claim, the district court agreed with Fitzsimmons that Schultz's conversations with him violated the Sixth Amendment, see Pet. App. 388-389, but concluded that a new trial was not warranted because Fitzsimmons had failed to show that he was prejudiced by the existence of the transcript. The court noted that none of Fitzsimmons' admissions in the transcript were introduced against him at trial,

that the transcript revealed no substantive information not already in the possession of the government, and that Fitzsimmons had not shown that Schultz's conversations with him adversely affected his attorney-client relationship. *Id.* at 389-393. The district court also rejected petitioners' Fifth Amendment claim based on *Brady* v. *Maryland*, 373 U.S. 83 (1963), reaffirming its conclusion that the "transcript * * * did not contain exculpatory evidence." *Id.* at 399.

5. The court of appeals affirmed in an unpublished opinion. Pet. App. 415-490.

a. The court rejected Fitzsimmons's Sixth Amendment claim based on its conclusion that Fitzsimmons had not shown any prejudice. Pet. App. 460-462. It also rejected Fitzsimmons' argument that prejudice must be presumed from the government's acquisition of the transcript, concluding that a presumption of prejudice would be appropriate only if the informant had conveyed the contents of confidential attorney-client conversations to the government. *Id.* at 460-462.

b. The court also rejected petitioners' Fifth Amendment claims that were based on the government's failure to disclose the transcript until after trial. Pet. App. 462-469. The court noted that a retrial was necessary only if "there is a reasonable probability that had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.* at 462 (quoting *United States* v. *Bagley*, 473 U.S. 667, 682 (1985)). It then reviewed the transcript and concluded that the material contained "very little information [that] has exculpatory value" as to Fitzsimmons. Pet. App. 462. Similarly, it regarded the exculpatory value of the statements concerning Towne as "slight," and noted that several of

the statements regarding him "tend to be incriminating." *Id.* at 468.

c. The court of appeals also rejected petitioners' argument that the RICO conspiracy counts could not be sustained because the statute of limitations had run with respect to the predicate acts described in the substantive RICO count that was dismissed by the district court. Pet. App. 474-487. The court of appeals explained that the statute of limitations began to run at the time of the termination of the conspiracy, not at the time of the commission of the predicate acts, because "it is the agreement to commit these acts, not the acts themselves, that is the basis of the conspiracy conviction." *Id.* at 487. Because the conspiracy continued into the limitations period, the court held that the conspiracy charge was not time-barred. *Id.* at 485-486.

ARGUMENT

1. Petitioners first contend (Pet. 16-29) that the five-year statute of limitations set forth in 18 U.S.C. 3282 bars their conviction on the RICO conspiracy count. They argue that the statute of limitations barred prosecution for the predicate acts described in the indictment, and that those acts therefore may not serve as predicate acts for a RICO conspiracy charge.

As the court of appeals concluded, the question whether the predicate acts charged in the substantive RICO count were time-barred at the time of the indictment is irrelevant to the question whether the statute of limitations barred the RICO conspiracy count. In the case of conspiracies having no overt act requirement, such as RICO conspiracies, the limitations period is measured by reference to the duration of the criminal agreement, not the particular activi-

ties in which each defendant engages. *Hyde* v. *United States*, 225 U.S. 347, 369-370 (1912); *United States* v. *Grammatikos*, 633 F.2d 1013, 1023 (2d Cir. 1980). The statute of limitations for a charge of conspiracy does not begin to run until the conspiracy as a whole terminates or until the defendant in question takes "some act to disavow or defeat the purpose" of the conspiracy. *Hyde*, 225 U.S. at 369; see *United States* v. *Kissel*, 218 U.S. 601, 608 (1910); *United States* v. *Brock*, 782 F.2d 1442, 1445 (7th Cir. 1986); *Grammatikos*, 633 F.2d at 1023. In the case of a RICO conspiracy, the limitations period therefore runs from the accomplishment or abandonment of the conspiracy. *E.g.*, *United States* v. *Torres Lopez*, 851 F.2d 520, 524-525 (1st Cir. 1988), cert. denied, 489 U.S. 1021 (1989); *United States* v. *Persico*, 832 F.2d 705, 713-714 (2d Cir. 1987), cert. denied, 486 U.S. 1022 (1988); *United States* v. *Coia*, 719 F.2d 1120, 1124 (11th Cir. 1983), cert. denied, 466 U.S. 973 (1984), Under this test, petitioners' convictions are valid, because the conspiracy did not terminate until less than five years before the indictment, and because neither petitioner withdrew from the conspiracy before it terminated.

Petitioners err in relying (Pet. 24-29) on *Stromberg* v. *California*, 283 U.S. 359 (1931), and related cases. Those cases stand for the proposition that an indictment does not properly charge conspiracy if the objects of the conspiracy are not themselves unlawful. But that proposition has no relevance to this case, because petitioners cannot show that the objects of the RICO conspiracy of which they were convicted were lawful. Petitioners do not argue in this Court that the actions described in the indictment were lawful when taken; they argue only that the statute of

limitations has placed those acts beyond the reach of criminal sanctions. Because the limitations period for the RICO conspiracy charge had not run at the time petitioners were indicted, that count was not time-barred.

2. Petitioner Fitzsimmons also contends (Pet. 29-46) that the court of appeals erred in rejecting his Sixth Amendment claim on the ground that he failed to show that he had been prejudiced.

As this Court has explained, a Sixth Amendment violation that does not prejudice the defendant "provides no justification for interfering with * * * criminal proceedings." *United States* v. *Morrison*, 449 U.S. 361, 366 (1981); see *Weatherford* v. *Bursey*, 429 U.S. 545, 558 (1977) ("there can be no Sixth Amendment violation" absent "at least a realistic possibility of injury"). The district court and the court of appeals have reviewed the record here and concluded that Fitzsimmons was not in fact prejudiced, see Pet. App. 389-393, 460-462; his factbound claims to the contrary do not merit further review.[1]

Nor is there any merit to Fitzsimmons' contention that the decision below conflicts with the decisions of the Third Circuit in *United States* v. *Levy*, 577 F.2d 200 (1978), and the District of Columbia Circuit in *Briggs* v. *Goodwin*, 698 F.2d 486, 493, rev'd on rehearing on other grounds, 712 F.2d 1444 (1983), cert. denied, 464 U.S. 1040 (1984). Neither case holds that a defendant can secure reversal of his

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[1] Contrary to Fitzsimmons' suggestion (Pet. 33), the lower courts did not find that Fitzsimmons suffered no prejudice simply because the information was not introduced at trial. Both courts concluded that Fitzsimmons was not prejudiced because the information was *neither* introduced at trial *nor* otherwise helpful to the government. See Pet. App. 391-393, 460.

conviction without establishing prejudice. *Levy* concluded that a defendant adequately established prejudice by showing that confidential attorney-client communications had been disclosed to the government. As the court of appeals concluded, no such information was disclosed here. *Briggs* was not a criminal prosecution at all, but a *Bivens* action against a prosecutor in a case in which the defendant had been acquitted; that case has little relevance in determining the appropriate remedy for the alleged Sixth Amendment violation that occurred in this case. The court of appeals' conclusion that Fitzsimmons was not prejudiced merits no further review.[2]

3. Finally, petitioner Towne contends (Pet. 46-55) that the lower courts erred in concluding that the transcript of Schultz's conversations with Fitzsimmons was not exculpatory. Accordingly, Towne argues, his conviction should be reversed because of the government's failure to deliver the transcript to him before the trial.

Both courts below reviewed the transcript and concluded that it was not exculpatory. Pet. App. 101, 401-402, 466-469 (noting that the "exculpatory

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[2] Fitzsimmons contends (Pet. 30) that this Court should grant certiorari to resolve the question whether the defendant or the government bears the burden of establishing or disproving prejudice, an issue discussed by Justice White in his dissent from denial of certiorari in *Cutillo* v. *Cinelli*, 485 U.S. 1037 (1988). This case is not an appropriate vehicle to resolve that issue, because the question was not discussed or decided by the court of appeals, cf. *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 697 (1984); *G.D. Searle & Co.* v. *Cohn*, 455 U.S. 404, 414 (1982), and because there is no reason to believe that the courts below would have concluded that Fitzsimmons was prejudiced even if they had specifically held that the government bore the burden of establishing the absence of prejudice.

value" is "slight" and that several of the statements "tend to be incriminating"). The lower courts' conclusion that the transcript was not exculpatory does not conflict with the decisions of other courts of appeals nor does it raise any legal question of general significance. In substance, Towne challenges a factual assessment in which both of the lower courts concurred, a matter generally not suitable for review in this Court. See *Rogers* v. *Lodge*, 458 U.S. 613, 623 (1982).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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